CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., PITTSBURGH PLATE GLASS COMPANY (INC.), CHURCH & DWIGHT CO., INC., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION, WEST END CHEMICAL CO. (INC.), PACIFIC ALKALI CO., (LTD.), PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRITTS OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR CERTIORARI FILED MARCH 5, 1945.

CERTIORARI GRANTED MARCH 5, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., PITTSBURGH PLATE GLASS COMPANY (INC.), CHURCH & DWIGHT CO., INC., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION, WEST END CHEMICAL CO. (INC.), PACIFIC ALKALI CO., (LTD.), PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from D. C. U. S., Southern District of New York	1	1
Summons	1	1
Complaint	2	2
Exhibit "A"—Notes of meeting in New York on 27th, 28th and 29th of February, 1924	18	35
Exhibit "B"—Letter, J. G. Nicholson to Imperial Chemical Industries, Ltd., October 22, 1929	51	37
Exhibit "C"—Agreement between Alkasso and I. C. I.	53	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 12, 1945.

—7064

	Original	Print
Record from D. C. U. S., Southern District of New York—Continued		
Complaint—Continued		
Exhibit "D"—Alkasso-British agreement, July 1, 1936	55	40
Exhibit "E"—Letter, Calkex to Alkasso, December 2, 1937, and attached memorandum	59	43
Exhibit "F"—Notes of meeting of Executive Committee of Alkasso, July 31, 1941	63	46
Motion to dismiss	69	50
Order approving stipulation re extension of time to file answers, etc	72	51
Stipulation re extension of time to file answers, etc	73	52
Opinion, Coxe, J	75	53
Order denying motion to dismiss	80	56
Clerk's certificate (omitted in printing)	82	
Orders allowing certiorari	83	57

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 24-464

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., CALIFORNIA ALKALI EXPORT ASSOCIATION, Imperial Chemical Industries, Ltd., Imperial Chemical Industries (New York) Ltd., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., Diamond Alkali Company (Inc.), Dow Chemical Company, Inc., Hooker Electrochemical Company (Inc.), The Mathieson Alkali Works, (Inc.), Niagara Alkali Co., Pennsylvania Salt Manufacturing Co., Southern Alkali Corporation, Westvaco Chlorine Products Corporation, Inc., Wyandotte Chemicals Corporation, West End Chemical Co. (Inc.), Pacific Alkali Co. (Ltd.), Defendants

SUMMONS—Filed March 16, 1944

To the above named Defendants:

You are hereby summoned and required to serve upon Herbert A. Berman, Harold L. Schilz and Lawrence S. Apsey, Special Assistants to the Attorney General, plaintiff's attorneys, whose address is Department of Justice, Antitrust Division, 14th Floor, 30 Broad Street, New York 4, N. Y., an answer to the compiaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ George J. H. Follmer, Clerk of Court. (Seal of Court.)

Date: March 16, 1944.

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT—Filed March 16, 1944

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:

The United States of America, seeking equitable relief, by its attorneys, acting under the direction of the Attorney General, files this complaint against the defendants and complains and alleges as follows:

[fol. 3] I. Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Antitrust Act", in order to prevent and restrain continuing violations by defendants, as hereinafter alleged, of Section I of the Sherman Anti-trust Act.

2. The defendants Niagara Alkali Co. and Imperial Chemical Industries (New York) Ltd. are inhabitants of the Southern District of New York, both being incorporated under the laws of the State of New York, the former having its principal offices and place of business at 60 East 42nd Street, Borough of Manhattan, New York City, and the latter having its principal offices and place of business at 521 Fifth Avenue, Borough of Manhattan, New York City; and each of the defendants United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company, (Inc.), Church & Dwight Co., Inc., The Mathieson Alkali Works, (Inc.), Niagara Alkali Co., Pennsylvania Salt Manufacturing Co., Southern Alkali Corporation, Westvaco Chlorine Products Corporation, Inc., and American Potash & Chemical Corporation transacts business and is found within the Southern District of New York.

II. The Defendants

3. The United States Alkali Export Association, Inc., (hereinafter referred to as Alkasso), a corporation organ-[fol. 4] ized under the laws of the State of Delaware and

having its principal offices and place of business at No. 11 Broadway in the Borough of Manhattan, New York, New York, is named a defendant herein.

4. California Alkali Export Association (hereinafter sometimes referred to as Calkex), a corporation organized and existing under the laws of the State of California, having its offices and principal place of business at 530 West Sixth Street, Los Angeles, California, is made a defendant herein.

5. Imperial Chemical Industries, Ltd. (hereinafter sometimes referred to as ICI), a corporation organized and existing under the laws of the United Kingdom, with offices and principal place of business at London, England, is made a defendant herein.

6. Imperial Chemical Industries (New York), Ltd. (hereinafter sometimes referred to as ICI (N.Y.)), a corporation organized and existing under the laws of the State of New York, with offices and principal place of business at 521 Fifth Avenue, New York, New York, is made a defendant herein. The entire capital stock of ICI (N.Y.) is beneficially owned by ICI. ICI (N.Y.) conducts no independent business operations of its own but acts solely and exclusively as agent for ICI for the transaction of business of ICI in the United States. Throughout the period covered by the combination and conspiracy alleged in this complaint, ICI has controlled and directed the policies, management, and activities of ICI (N.Y.). Furthermore, ICI brought about the incorporation of ICI (N.Y.) and has continued its corporate existence solely to transact business of ICI in the United States. [fol. 5] Many of the activities of ICI (N.Y.) have, at the direction of ICI, been in furtherance of the combination and conspiracy herein alleged. In 1935 the then president and general manager of ICI (N.Y.) described that corporation as the "private commercial legation" of ICI, and the manager of ICI (N.Y.) as "ICI's ambassador to North America," and characterized the function of ICI (N.Y.) as "to hold the ICI fort in North America."

7. Pittsburgh Plate Glass Company (Inc.), a corporation organized and existing under the laws of the State of Pennsylvania, having its offices and principal place of business at 30 Rockefeller Plaza, New York, New York, is made a

defendant herein. Said defendant manufactures alkalis in its factories located at Barberton, Ohio.

8. Church & Dwight Co., Inc., a corporation organized and existing under the laws of the State of Delaware, having its offices and principal place of business at 70 Pine Street, New York, New York, is made a defendant herein. Said defendant manufactures alkalis in its factories located at Syracuse, N. Y.

9. Diamond Alkali Company (Inc.), a corporation organized and existing under the laws of the State of Delaware, having its offices and principal place of business at 537 Smithfield Street, Pittsburgh, Pennsylvania, is made a defendant herein. Said defendant manufacturers alkalis in its factories located at Painesville, Ohio.

10. Dow Chemical Company. Inc., a corporation organized and existing under the laws of the State of Michigan, having its offices and principal place of business at Mid- [fol. 6] land, Michigan, is made a defendant herein. Said defendant manufactures alkalis in its factories located at Midland, Michigan; Freeport, Texas; Pittsburgh, California; and Tacoma, Washington.

11. Hooker Electrochemical Company (Inc.) a corporation organized and existing under the laws of the State of New York, having its offices and principal place of business at Buffalo Avenue and 47th Street, Niagara Falls, New York, is made a defendant herein. Said defendant manufactures alkalis in its factories located at Niagara Falls, N. Y. and Tacoma, Washington.

12. The Mathieson Alkali Works (Inc.), a corporation organized and existing under the laws of the State of Virginia, having its offices and principal place of business at 60 E. 42nd Street, New York, New York, is made a defendant herein. Said defendant manufactures alkalis in its factories located at Saltville, Va.; Niagara Falls, N. Y.; and Lake Charles, La.

13. Niagara Alkali Co., a corporation organized and existing under the laws of the State of New York, having its offices and principal place of business at 60 E. 42nd Street, New York, New York, is made a defendant herein. Said defendant manufactures alkalis in its factories located at Niagara Falls, N. Y.

14. Pennsylvania Salt Manufacturing Co., a corporation organized and existing under the laws of the State of Pennsylvania, having its offices and principal place of business at 1000 Widener Bldg., Philadelphia, Pa., is made a defendant herein. Said defendant manufactures alkalis in its factories located at Wyandotte, Mich, and Tacoma, Washington.

[fol. 7] 15. Southern Alkali Corporation, a corporation organized and existing under the laws of the State of Delaware, having its offices and principal place of business at 30 Rockefeller Plaza, New York, New York, is made a defendant herein. Said defendant manufacturers alkalis in its factories located at Corpus Christi, Texas.

16. Westvaco Chlorine Products Corporation, Inc., a corporation organized and existing under the laws of the State of Delaware, having its offices and principal place of business at 405 Lexington Ave., New York, New York, is made a defendant herein. Said defendant manufactures alkalis in its factories located at South Charleston, W. Va.

17. Wyandotte Chemicals Corporation, a corporation organized and existing under the laws of the State of Michigan, having its offices and principal place of business at the Ford Building, Detroit, Michigan, is made a defendant herein. Said defendant manufacturers alkalis in its factories located at Wyandotte, Mich. Said defendant is the corporate successor of Michigan Alkali Co. (Inc.), which was merged with it in 1943.

18. West End Chemical Co. (Inc.), a corporation organized and existing under the laws of the State of California, having its offices and principal place of business at 608 Latham Square Building, Oakland, California, is made a defendant herein. Said defendant manufacturers alkalis in its factories located at Searles Lake and West End, California.

19. Pacific Alkali Co. (Ltd.), a limited partnership organized, duly registered and existing under the laws of the State of California, having its offices and principal place of [fol. 8] business at 1206 Pacific Mutual Building, Los Angeles, California, is made a defendant herein. Said partnership consists of Harvey S. Mudd and Seeley Mudd, as general and limited partners; and the Honnald Foundation, a

trust, and Philip Wiseman as limited partners. Said defendant manufacturers alkalis in its factories at Bartlett, California.

III. The Co-conspirators

20. American Potash & Chemical Corporation, a corporation organized and existing under the laws of the State of Delaware, having its offices and place of business at 70 Pine Street, New York, New York, is not made a defendant herein, but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. In or about 1942 substantially all of the capital stock of the said corporation was seized by Leo T. Crowley, the Alien Property Custodian of the United States, acting in compliance with law under the Acts of Congress and Executive Orders in such cases made and provided. The said Alien Property Custodian has now directed the management of the said corporation to withdraw as a member of Calkex and to terminate all of its obligations under the agreements hereinafter more particularly alleged and set forth entered into by the said corporation with Calkex and the other defendants and co-conspirators herein named.

21. Solvay Process Company, a corporation organized and existing under the laws of the State of New York, having its offices and principal place of business at 61 Broadway, New York, New York, is not made a defendant herein but is named as a co-conspirator to the combination and [fol. 9] conspiracy alleged in this complaint. Solvay Process Company is a wholly owned subsidiary of Allied Chemical & Dye Corporation. Solvay Process Company manufactures alkalis at its factories located in Syracuse, N. Y.; Hopewell, Va.; and Baton Rouge, La.

22. Solvay et Cie (hereinafter called Belgian Solvay), a corporation organized and existing under the laws of the Kingdom of Belgium, having had its offices and principal place of business at Brussels, Belgium, and now having its principal place of business at London, England, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. Belgian Solvay is the principal manufacturer of alkalis on the Continent of Europe, with factories located in Belgium, France, Germany, and other countries in Europe.

23. I. G. Farbenindustrie Aktiengesellschaft (hereinafter referred to as I. G. Farben), a corporation or assication or-

ganized under the laws of Germany, having its offices and principal place of business at Frankfort-am-Main, Germany, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy alleged in this complaint. I. G. Farben is the most important manufacturer of alkalis in Germany.

IV. Nature of the Trade and Commerce Involved and Background of the Conspiracy

24. The term "alkalis" includes soda ash (sodium carbonate), caustic soda (sodium hydroxide), and bicarbonate of soda.

[fol. 10] 25. The principal method for manufacture of alkalis is the so-called Solvay ammonia soda process which has been in general use since about 1870. This process is used to produce any or all of the three forms of alkalis above described, in any desired proportion. By this process, salt brine, ammonia gas, and carbon dioxide are treated together to bring about an interaction producing sodium bicarbonate. The resulting sodium bicarbonate may be purified and marketed as such. Most of the sodium bicarbonate so produced is, however, converted into soda ash by the application of heat. In turn the soda ash so produced may be marketed as such or it may be causticized by treatment together with lime to bring about an interaction producing caustic soda.

26. Caustic soda may also be produced directly from salt by an electrolytic process which is utilized in the manufacture of chlorine. In this process, an operation more recently developed than the ammonia soda process, salt brine is subjected to an electric current, and by electrolysis the salt and water are broken down into chlorine appearing at one pole of the electric cell and caustic soda produced in the solution. This process has been practiced to an increasing degree in recent years because of the growth in demand for chlorine, and accordingly increasing quantities of caustic soda have been produced by the electrolytic method.

27. Soda ash is used principally in the manufacture of glass, textiles, and chemicals. Among the important uses of caustic soda are the manufacture of soap, textiles, rayon, and paper, and the refining of petroleum products. Sodium bicarbonate is used for numerous industrial purposes and in many food and drug products. In purified form it is also

[fol. 11] an end product sold at retail as baking soda or for medicinal uses. In the year 1939 approximately 2,900,000 tons of soda ash were produced in this country, as were approximately 1,000,000 tons of caustic soda, and 140,000 tons of refined bicarbonate of soda. On the basis of average prevailing domestic prices for that year the soda ash so produced had a value in excess of $50,000,000, the caustic soda so produced had a value in excess of $40,000,000, and the refined bicarbonate of soda had a value of more than $5,000,000.

28. Each of the domestic companies named as defendants or co-conspirators herein, with the exception of Alkasso, Calkex, and ICI (NY) are engaged in the manufacture and sale of alkalis, with their respective factories located as is hereinabove described. Each of the aforesaid companies sells and ships the greater part of the alkalis manufactured by it to dealers and consumers of alkalis located in States other than those in which the respective factories of such manufacturer are located. All of the aforesaid domestic companies engaged in the manufacture and sale of alkalis conduct substantially all of their export trade in alkalis through Alkasso and Calkex in the manner hereinafter more particularly described.

29. ICI was formed in 1926 by a consolidation of four important British companies: Brunner, Mond & Co., Ltd., United Alkali Co., Ltd., British Dyestuffs Corporation, Ltd., and Nobel Industries, Ltd. Prior to the formation of ICI in 1926, Brunner, Mond & Co., Ltd., and United Alkali Co., Ltd., producers of alkalis in the United Kingdom, entered into agreements with Alkasso as part of the combination and conspiracy herein alleged. Upon the formation of ICI, ICI assumed, adopted, and carried out the agree-[fol. 12] ments made by its said predecessor companies with Alkasso. Whenever the term ICI is herein used in relation to activities and agreements prior to the formation of Imperial Chemical Industries, Ltd. in 1926, such term shall refer to Brunner, Mond & Co., Ltd. and United Alkali Co., Ltd.

30. ICI enjoys a virtual monopoly in the sale of chemicals, including alkalis, in the British Empire. Directly and through its subsidiary and affiliated companies ICI operates plants for the production of alkalis in various coun-

tries of the British Empire, including Great Britain, India, Australia, New Zealand, and the Union of South Africa. ICI also exports large quantities of alkalis produced principally in its factories in Great Britain to various markets of the world.

31. Co-conspirator I. G. Farben, one of the largest chemical companies in the world, with factories located at various cities and towns in Germany, is also engaged in the manufacture of alkalis and in export thereof to various markets of the world.

32. Co-conspirator Belgian Solvay is the most important manufacturer of alkalis in the European continent, with its principal factories located in Belgium, and exports large quantities of alkalis from Belgium to various markets of the world.

33. Alkasso was organized in 1919 as a corporation under the laws of the State of Delaware by Michigan Alkali Company, Inc., Pennsylvania Salt Manufacturing Company, Columbia Chemical Company, Solvay Process Company, and Hooker Electrochemical Company (Inc.). In that year Alkasso filed with the Federal Trade Commission a verified [fol. 13] written statement setting forth the location of its offices and the names and addresses of its officers and stockholders and a copy of its certificate of incorporation and by-laws, in order to obtain for it and for the aforesaid five corporations, as its members, the benefits and immunities provided by Sections 2 and 3 of the Act of Congress of April 10, 1918, c. 50, 40 Stat. 516, commonly known as the Webb Export Trade Act. After the formation of Alkasso the following additional corporations became its members in the following years, respectively:

Corporation	*Year it joined Alkasso*
Diamond Alkali Company (Inc.)	1919
Mathieson Alkali Works, Inc.	1919
Westvaco Chlorine Products Corporation, Inc.	1922
Church & Dwight Co., Inc.	1930
Dow Chemical Company, Inc.	1934
Niagara Alkali Co.	1934
Southern Alkali Co.	1935

34. All of the corporations which have become members of Alkasso have remained members up to the date of the filing of this complaint with the following exceptions: Solvay Process Company withdrew from membership in 1941. In 1920 Pittsburgh Plate Glass Co. (Inc.) acquired Columbia Chemical Company, and the two companies were consolidated. Thereupon, Pittsburgh Plate Glass Co. succeeded Columbia Chemical as a member of Alkasso and has at all times thereafter remained a member, acting as such either in its own name or in the name of Columbia Development Corporation, a corporation wholly owned, directed, [fol. 14] and managed by Pittsburgh Plate Glass Co. (Inc.). In 1943 Michigan Alkali Co., Inc., was merged with Wyandotte Chemicals Corporation, which succeeded Michigan Alkali Co., Inc., as a member of Alkasso.

35. Alkasso has at all times been owned and managed by its said members, each of whom, during membership, has owned shares of stock in it. The Board of Directors of Alkasso has at all times consisted of one officer or representative of each of the member companies. The activities of Alkasso have at all times been controlled, directed, and managed by its members, and each of its members has participated in such control, direction, and management.

36. Alkasso causes most of the alkalis obtained by it from its members or from other companies to be shipped from the respective factories located in various States in the United States to warehouses maintained and operated by Alkasso at Hoboken, New Jersey, and New Orleans, Louisiana from which points Alkasso transports such alkalis by steamship to various markets of the world in which markets it disposes of such alkalis to dealers and consumers located there. Alkasso also sells or permits its members to sell for direct shipment by rail from the plants of members to foreign destinations in Mexico and Canada.

37. Calkex was organized in 1936 as a corporation under the laws of Delaware by American Potash & Chemical Corporation, West End Chemical Co. (Inc.), and Pacific Alkali Co. (Ltd.). In that year Calkex filed with the Federal Trade Commission a verified written statement setting forth the location of its offices and the names and addresses of its [fol. 15] officers and stockholders and a copy of its certificate of incorporation and by-laws, in order to obtain for it

and its members the benefits and immunities provided by Sections 2 and 3 of the statute commonly known as the Webb Export Trade Act referred to above. The said three member companies have remained members of Calkex up to the date of the filing of this complaint.

38. Calkex has at all times been owned and managed by its aforesaid members, each of whom has, since the formation of Calkex, owned shares of its stock. The Board of Directors of Calkex has at all times consisted of a representative of each of the three member companies. The activities of Calkex have at all times been controlled, directed, and managed by its members, and each of its members has participated in such control, direction, and management.

39. Calkex causes most of the alkalis obtained by it from its member companies to be shipped from their respective factories to various ports on the Pacific Coast, Los Angeles, San Diego, and San Francisco, from which points Calkex transports such alkalis by steamship or by rail to various markets of the world.

40. Throughout the period of time covered by the combination and conspiracy alleged in this complaint Alkasso and Calkex, together have exported or controlled the export of most of the alkalis exported from the United States. Prior to 1940 Alkasso and Calkex together exported, either on behalf of their members or other manufacturers of alkalis in the United States, in excess of 95% of the alkalis exported from this country. Due to extraordinary war con-
[fol. 16] ditions and the resignation of Solvay Process Company from membership in Alkasso in 1941, the percentage of alkalis exported by Alkasso and Calkex, either on behalf of their members or others, fell to approximately 75% of the total alkalis exported from the United States. At the time of the resignation of Solvay from Alkasso, all important producers of alkalis in the United States were members either of Alkasso or Calkex, and, except for Solvay, are now members.

V. Violations of Law

41. Beginning in or about 1924 and continuing thereafter up to and including the date of the filing of this complaint, defendants Alkasso and ICI and those defendants who were

members of Alkasso in 1924 have been and now are, and the remaining defendants from the time of their respective admission as members of Alkasso or Calkex, and Calkex, from its formation, have been and now are, and from time to time during said period the co-conspirators have been engaged in an unlawful combination and conspiracy, by the means and methods hereinafter set forth, in restraint of the aforesaid trade and commerce in alkalis among the several States of the United States and with foreign nations, and the defendants and co-conspirators have been and defendants now are parties to contracts, agreements, and understandings in restraint of such trade and commerce, all in violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act. Such combination and conspiracy and such unlawful contracts, agreements, and understand- [fol. 17] ings will continue unless the relief hereinafter prayed for in this complaint is granted. The aforesaid illegal combination and conspiracy has consisted in a continuing agreement and concert of action the terms of which have been as follows:

(a) That Alkasso, Calkex, their respective members, ICI, I. G. Farben, and Belgian Solvay would not compete with each other in the sale of alkalis in any market of the world outside of the United States.

(b) That ICI, I. G. Farben, and Belgian Solvay would refrain from importing alkalis into the United States.

(c) That Alkasso, Calkex, and their respective members would be assigned certain marketing areas as their exclusive territory and that ICI, I. G. Farben, and Belgian Solvay would refrain from exporting alkalis to such territory and would prevent other European manufacturers from exporting alkalis thereto. Included in such agreed exclusive territory given to Alkasso, Calkex, and their respective members was the United States.

(d) That ICI, I. G. Farben, and Belgian Solvay would each be assigned certain market areas as its exclusive, and that Alkasso, Calkex, and their respective members would refrain from exporting alkalis to such territories, and would prevent other American manufacturers and dealers

from exporting alkalis thereto. Included in such agreed exclusive territory given ICI was the British Empire (except Canada); included in such agreed exclusive territory given Belgian Solvay was the Continent of Europe, with [fol. 18] the exception of the countries given to I. G. Farben; included in such agreed exclusive territory given I. G. Farben were the Scandinavian countries.

(e) That the markets of the world not allocated exclusively to Alkasso, Calkex, their respective members, ICI, I. G. Farben, or Belgian Solvay, were to be shared jointly by Alkasso, Calkex, their respective members, and ICI. Such territory to be so shared is sometimes hereinafter referred to as joint territory.

(f) That Alkasso, Calkex, their respective members, and I.C.I. would eliminate competition between each other in the sale of alkalis exported by such companies to joint territory by allocating quotas to the American and British companies respectively, thereby limiting their exports to certain fixed percentages of the total alkalis sold by such companies or to fixed maximum amounts or both, and by agreeing with each other upon the prices at which alkalis were to be sold in such markets.

(g) That Alkasso, Calkex, and their respective members would prevent other manufacturers and dealers in the United States from exporting alkalis from the United States to joint territory unless they complied with the quota arrangements and prices fixed by Alkasso and ICI for such territory, and that Alkasso, Calkex, and their members would prevent such other manufacturers and dealers from exporting alkalis from the United States to territory allocated exclusively to Alkasso, Calkex, and their respective members except at the prices fixed by Alkasso for such territory.

(h) That Alkasso, Calkex, and their respective members would conduct their export trade and utilize the aforesaid [fol. 19] arrangements and their practices thereunder in such manner as to enhance and to stabilize and maintain at uniform and noncompetitive levels the prices at which caustic soda is sold in the United States by manufacturers to dealers and consumers therein.

42. Said unlawful combination and conspiracy has been formed, effectuated, and furthered by divers means and

methods including those hereinafter in Paragraphs 43 through 63 hereof alleged and set forth.

43. Prior to the formation of the combination and conspiracy herein alleged, ICI was engaged in exporting alkalis to the United States, and ICI, Alkasso, and its members competed with each other in the sale of alkalis in this country and in world markets. In or about 1924, ICI agreed with Alkasso that ICI would refrain from exporting alkalis to the United States. This agreement is still in full force and effect. Alkasso and its members agreed to enter into marketing arrangements with ICI to eliminate competition in the sale of alkalis in other markets of the world.

44. Accordingly Alkasso, acting on behalf of itself and its members, entered into an agreement with ICI evidenced by a written memorandum dated February 29, 1924. A copy of such memorandum is attached hereto as a part hereof marked Exhibit A. The agreement provided:

(1) That ICI would refrain from exporting alkalis to Cuba.

(2) That out of the alkalis to be sold by Alkasso, its members, and ICI in Mexico, Alkasso and its members [fol. 20] would be allocated a quota of 60%, and ICI would be allocated the remaining 40% in such market. In the event the total amount of caustic soda and soda ash sold by both the American and British companies exceeded 8,750 tons and 3,750 tons, respectively, the excess would be supplied exclusively by the American companies.

(3) That Alkasso and its members would employ the agent of the British Company in Mexico, Messrs. William Young & Company, to act also as their agent for the distribution of alkalis in Mexico. It was agreed that Messrs. William Young & Company should fix the prices at which alkalis would be sold in such market by Alkasso, its members, and ICI.

(4) That Alkasso would not ship more than 6,500 tons annually of caustic soda and 1,000 tons annually of soda ash to South America. It was further provided that out of this total tonnage, the quantity of alkalis shipped annually to South America should not exceed certain stated amounts for certain specified

countries. ICI agreed to provide a market for the specified tonnage allotted to Alkasso and its members.

(5) That the prices of alkalis sold in South America were to be raised and Alkasso and its members agreed to charge the same price for alkalis sold by them as were charged by ICI.

(6) That all shipments of alkalis to South America made by United States manufacturers not members of Alkasso were to be charged against the quota allotted to [fol. 21] Alkasso and were accordingly to be deducted from the tonnage allocated to it in South American markets.

45. The above mentioned agreement of February 29, 1924, was thereafter modified and supplemented by an agreement made by Alkasso, acting on behalf of itself and its members, and ICI, which agreement was evidenced by a letter written by ICI to Alkasso dated October 22, 1929, a copy of which is attached hereto as a part hereof marked Exhibit B. The said agreement provided:

(1) That the share of United States manufacturers and distributors, including Alkasso and its members, in exports of alkalis to foreign markets should be the following percentages of the total exports of alkalis from the United States and the United Kingdom:

United States Share of World Markets

1930	22½%
1931	24%
1932	25%

(2) That all exports of alkalis by all United States manufacturers should be considered as made under Alkasso's quota.

(3) That there would be complete cooperation between Alkasso and its members and ICI in order to avoid competition in the sale of alkalis in any market of the world, and that in order to prevent competition from other United States manufacturers of alkalis not members of Alkasso, Alkasso would, apart from its assumption of their exports in its quota, take the necessary step to control such manufacturers to bring about stabilization of prices for alkalis.

[fol. 22] (4) That ICI would take measures to assure to Alkasso and its members a market for their exports within the limits of their quota.

(5) That the agreement should run through the end of the year 1932.

46. In the aforesaid letter dated October 22, 1929, ICI advised Alkasso that it would renew the agreement at the end of 1932 only "provided that the recent steady increase in your percentage should not continue thereafter and that, when you have reached 25%, you should be prepared to continue cooperation with us on that basis for a further period of years."

47. In 1933 Alkasso, acting on behalf of itself and its members, and ICI entered into a further agreement evidenced by a written memorandum of meetings held in New York City on May 8th and May 9th, 1933 between representatives of Alkasso, its members and ICI, a copy of which memorandum is attached hereto as a part hereof marked Exhibit C. The agreement evidenced thereby provided:

(1) That Alkasso and its members on the one hand, and ICI on the other, should share in exports of alkalis to the following countries upon the basis of the following percentages of their total exports thereto as their respective quotas, subject to the following limitations on maximum exports:

	Alkasso	*ICI*
Mexico	80%	20% with maximum 5000 T
China	7% with maximum 4000 T	93%
India	3% with maximum 2000 T	97%

[fol. 23] (2) That Alkasso should count in the quota for itself and its members exports of alkalis by other American manufacturers except shipments of natural soda from western ports of the United States, as to which Alkasso expressed the opinion that any such shipments were improbable.

(3) That the respective quotas for total exports by the parties should be on the basis of 25% to Alkasso and 75% to ICI.

(4) That Alkasso and its members and ICI would employ a joint agent to distribute alkalis exported by them to Mexico, that Alkasso would market all alkalis exported by it and its members to China through a subsidiary of ICI in that country, and that Alkasso and its members would market their quota of alkalis in India at prices to be agreed upon between Alkasso's agent and ICI's agent in that country.

(5) That in all other markets Alkasso, its members, and ICI should sell at agreed prices, or, in case of dispute, at the prices determined by the party having the larger interest in the market concerned.

(6) That the parties should exchange complete figures as to shipments and sales of sales of alkalis exported.

(7) That the agreement should be effective from January 1, 1933 to April 30, 1936, and should continue in effect thereafter unless terminated by six months' notice by either party.

48. Prior to 1936 defendant ICI had entered into cartel [fol. 24] arrangements with the co-conspirators I. G. Farben, Belgian Solvay and other European manufacturers which provided for division of world markets in the sale of alkalis among the parties to the cartel. The cartel arrangements allocated the Continent of Europe to I. G. Farben and Belgian Solvay as their exclusive territory and they agreed not to export alkalis outside of the Continent of Europe. Prior to 1936, American Potash and Chemical Corporation, West End Chemical Company, and Pacific Alkali Company, producers of alkalis in California, were exporting such alkalis to Scandinavian countries which had been exclusively allocated to I. G. Farben, and to other countries in the Continent of Europe. Because of this competition I. G. Farben threatened to repudiate its cartel arrangements and to undertake the export of alkalis to all countries of the world. In order to prevent I. G. Farben and other European producers from abandoning the cartel arrangements and exporting alkalis to the United States and to other markets which Alkasso and ICI had allocated to each other exclusively, or to the joint territory which they had agreed to share under the quota and price-fixing arrangements hereinabove set forth, Alkasso and ICI entered into negotiations with I. G. Farben and Belgian Solvay

and, in or about 1936, concluded an agreement with them which provided:

(1) That ICI, I. G. Farben, and Belgian Solvay would refrain from exporting alkalis to the United States.

(2) That Belgian Solvay would be assigned the Continent of Europe with the exception of the Scandinavian countries, as its exclusive territory, that I. G. Farben would be assigned the Scandinavian countries as its exclusive territory, and [fol. 25] that each of the said companies would refrain from exporting alkalis from the Continent of Europe to any countries allocated to Alkasso or ICI exclusively or shared by them as joint territory under agreements between Alkasso and ICI, or to any other countries of the world except as provided in cartel agreements to which ICI, Belgian Solvay, and I. G. Farben were parties.

(3) That Alkasso and its members and ICI would refrain from exporting alkalis to the Continent of Europe except that ICI was permitted to make limited exports to that Continent.

(4) That Alkasso and its members would refrain from exporting alkalis to the British Empire except within certain limits to be agreed upon between Alkasso and ICI.

(5) That Alkasso and its members would prevent other American manufacturers from exporting alkalis to the markets allocated exclusively to ICI, Belgian Solvay, or I. G. Farben, and on their part those companies would prevent other European manufacturers from exporting alkalis to the United States or to any other country allocated exclusively to Alkasso or ICI, or shared by them as joint territory by agreements between them.

49. The aforesaid agreement set forth in the previous paragraph has continued in force and effect except to the extent its operation has been suspended by the present war.

50. To effectuate the understandings described in paragraph 48, in or about June, 1936, Alkasso, acting on behalf of itself and its members, entered into a further agreement [fol. 26] with ICI and Belgian Solvay, which agreement was evidenced by a written memorandum dated July 1, 1936,

a copy of which is attached hereto as a part hereof marked Exhibit D. The said agreement in substance provided:

(1) That Belgian Solvay was assigned the continent of Europe (excluding Russia) as its exclusive territory.

(2) That ICI was assigned the British Empire (excluding Canada), Egypt, the Levant, Iraq, and Iran as its exclusive territory.

(3) That Alkasso was assigned Canada, Mexico, Cuba, Haiti, San Domingo, the Dutch East Indies, and (effective as of July 1, 1939) the Dutch West Indies as its exclusive territory.

(4) That each of the parties would refrain from exporting alkalis into the exclusive territory of the other party (with certain exceptions as to particular sodas), and that each of the parties assumed responsibility for and agreed to include in its quota any exports of alkalis thereto from the territory allocated exclusively to it.

(5) That exports of alkalis to the countries listed below should be shared between ICI and Alkasso in the following proportions:

	ICI	*Alkasso*
China	80%	20%
Japan	65%	35%
River Plata	65%	35%
Brazil	75%	25%
Other (Principally the rest of Central and South America)	75%	25%
Bahrein Island	60%	40%

[fol. 27]. (6) That if any part should erect a factory for the manufacture of alkalis in its exclusive territory outside of the United Kingdom of Europe, such party would prevent any exports of alkalis produced in such factory to any of the territories covered by the agreement.

(7) That if any party should erect a factory for the manufacture of alkalis in the joint territories with the result that imports into such territory were no longer possible, then the other party sharing such territory would have the option either—

(a) of capital participation in the proportion of its quota in that market, or

(b) of equitable compensation on terms to be mutually agreed upon.

(8) That: "In the event of such circumstances arising either through government action or otherwise which render it impossible for any one of the parties to observe any of the portions of this agreement regarding exports, the parties undertake to meet and use their best endeavours to arrive at a modification of this agreement which will not prejudice the general position of any one of them."

(9) That each party would use its best endeavours to prevent shipments of alkalis by any persons from its exclusive markets to markets allocated exclusively to the other parties and to require such persons to adhere to the agreed quotas in the joint markets; and that in the event shipments occurred from the exclusive market of one party to the exclusive market of another, the prejudiced party [fol. 28] would be compensated by the right to ship an equivalent amount of alkalis to a joint market, and such shipment would be regarded for quota purposes as having been made by the offending party.

(10) That the agreement should be effective as of July 1, 1936, and should continue in effect until June 30, 1941, and thereafter indefinitely subject to one year's notice of termination by any party.

51. The said agreement of July 1, 1936, has remained in full force and effect up to the filing of the complaint except to the extent modified as hereinafter set forth.

52. After outbreak of the present war in 1939 shipping and supply problems led to modification of the quota arrangements between defendants Alkasso and ICI. In the Spring of 1941 meetings were held between representatives of Alkasso and its members, and representatives of the defendant ICI at Rio de Janeiro in Brazil. Further meetings were also held between representatives of Alkasso and ICI and ICI (N. Y.) in June and July 1941. As a result of such meetings and negotiations a further agreement was entered into between defendants ICI and Alkasso, the latter acting on behalf of itself and its members. This agreement was made effective as of July 1, 1941, and was to continue in effect indefinitely thereafter, and is still in full force and effect. Said agreement (hereinafter referred to as the

Agreement of July 31, 1941) is evidenced by certain minutes, a copy of which is attached hereto as a part hereof marked "Exhibit F." Said agreement provided in substance as follows:

[fol. 29] (1) That there would be no change in the exclusive markets previously allocated between the parties as above described, except by mutual consent of Alkasso and ICI.

(2) That quota for sales of alkalis in Brazil by Alkasso and its members be 30% of the sales made in that country by them and ICI, as against 70% for ICI. It was further agreed that; in the event ICI's sales in Brazil, due to inability to supply alkalis to this market, should drop below 60% of the total sold by the parties, Alkasso would supply ICI with sufficient alkalis to enable ICI to maintain a minimum quota of 60%, and, under such conditions Alkasso would receive a maximum quota of 40%.

(3) That ICI's quota of sales in the Argentine, Paraguay and Uruguay should be 60% as against 40% for Alkasso and its members. It was further agreed that in the event Alkasso's sales in these countries, due to inability to supply alkalis to these markets, should fall below 40% of the total quantity of alkalis sold by the parties therein, ICI would supply Alkasso with sufficient alkalis to enable it to maintain its minimum quota position in those markets of 40%.

(4) That the quotas for sales of alkalis by Alkasso, its members, and ICI should be on the basis of 60% for ICI in Peru as against 40% for Alkasso, and in Venezuela and Columbia 50% for ICI and 50% for Alkasso.

That as to miscellaneous other countries such as China and Central America, which had been joint territories under the Agreement of 1936 referred to in Paragraph 50, [fol. 30] ICI and Alkasso would make no attempt to establish quotas for exports to such areas but that any shipments thereto would be handled according to the past arrangements, and according to such shipping facilities and such material as should be available, except that any part of the British Empire would be handled by ICI exclusively unless it should call upon Alkasso for assistance.

53. Throughout the period of time covered by the conspiracy herein alleged each of the member companies of Alkasso, during the period of its membership as herein set forth, has participated in the negotiation of the several agreements entered into by defendant Alkasso as hereinabove described and has approved of such agreements, has accepted their benefits, and assumed the obligations thereof, and has participated in carrying them out. In order to insure that Alkasso's members should not exceed the quota given Alkasso by its agreements with ICI, Alkasso has from time to time allocated to each of its member companies a certain percentage of the total exports of alkalis comprising the Alkasso quota. Further to assure compliance by its members with the several agreements which Alkasso had entered into with defendants ICI and Co-conspirators Belgian Solvay and I. G. Farben, Alkasso has utilized and, until 1940, maintained in effect with all its members their membership agreements which provided that such members would conduct all of their export trade in alkalis exclusively through Alkasso or subject to its express consent. In 1940 Alkasso revised such membership agreement and eliminated therefrom the formal requirement that members effect export sales only through it or with its consent, but the understanding has continued in effect between [fol. 31] the parties to the date of the filing of this complaint that the member companies should export alkalis only in the quantities, at the prices, through the agency outlets, and to the countries permitted by Alkasso.

Alkasso's Control Over Exports By Its Domestic Competitors

54. At the time of the negotiations between Alkasso and ICI with Belgian Solvay and I. G. Farben in 1935 and 1936, as hereinabove alleged in Paragraph 48, three manufacturers of alkalis located on the West Coast, American Potash & Chemical Corporation, West End Chemical Co. (Inc.), and Pacific Alkali Co. (Ltd.), were engaged in exporting alkalis independently of Alkasso. Some exports were made by these companies to territory allocated exclusively to ICI, I. G. Farben, and Belgian Solvay. Such companies were also exporting the alkalis to so-called joint territories of Alkasso and ICI and to territory allocated exclusively to Alkasso and its members and were competing with them for the sale of alkalis in such markets.

55. As part of the conspiracy herein alleged and to effectuate the purposes thereof, in order to eliminate competition from the aforesaid Pacific Coast companies, and as a means to bring about the agreement with ICI, I. G. Farben, and Belgian Solvay described in Paragraph 48 above, and in order to carry out its obligations thereunder, Alkasso caused the three Pacific Coast companies to organize defendant Calkex. Upon its formation Calkex, acting on behalf of itself and its members, entered into an understanding with Alkasso, acting on behalf of itself and its members, whereby Calkex and its members agreed [fol. 32] to conduct their exports of alkalis from the United States only in accordance with the agreements entered into between Alkasso and ICI, and between Alkasso, ICI, I. G. Farben, and Belgian Solvay. As apart of this understanding Calkex and its members agreed to refrain from exporting alkalis from the United States to any market allocated exclusively to ICI, Belgian Solvay, or I. G. Farben. Furthermore, Alkasso and Calkex agreed that the quotas allocated to Alkasso in the so-called joint territory by Alkasso's agreements with ICI should constitute a joint quota for both Calkex and Alkasso, and that Calkex would be given a certain proportion of Alkasso's quota in such joint markets.

56. In order to carry out the understanding thus reached by Alkasso and Calkex, they, on behalf of themselves and their members, entered into an agreement evidenced by a memorandum attached to a letter from Calkex and Alkasso dated December 2, 1937, a copy of which is attached hereto as a part hereof marked Exhibit E. The said agreement provided:

(1) That, except as below stated, Calkex and its members would confine their exports of alkalis to Latin America, Java, China, Japan, The West Indies, and western Canada.

(2) That in the year 1938 Calkex would, in addition, be allowed to export 100 tons of alkalis to New Zealand.

(3) That in addition Calkex should be allowed to export the following quantities of Alkalis to India during the following years: 4,000 long tons in 1938; 2,000 long tons in [fol. 33] 1939; and 1,000 long tons in 1940. It was agreed that the alkalis so exported to India by Calkex should be sold by it exclusively to the subsidiary of ICI in India.

(4) That miscellaneous sales of alkalis made by Calkex in The West Indies and certain other Latin American markets independently of Alkasso should be at prices fixed by Alkasso and ICI.

(5) That, with minor exceptions and except in ICI territory where ICI should act as agent, the exports of alkalis by Calkex and its members should be handled exclusively through agents of Alkasso. Independent sales by Calkex were permitted in Cuba during the first half of 1938; temporarily in Rio de Janeiro and Santos in Brazil; and during the first half of 1938 and to the extent of 1,000 tons in Argentina. Means of handling exports to China were left for adjustment.

(6) That Calkex and its members should be permitted to export under certain quotas to certain countries according to the following tentative distribution of tonnage which was made subject to revision.

Argentina	2,000 tons
Brazil	2,000 "
Peru and Chile	400 "
Mexico	3,000 "
Canada	400 "
Japan	1,500 "
Java	2,000 "
India	4,000 "
Total	15,300 "

(7) That the agreement should continue in effect indefinitely subject to cancellation upon 60 days notice by Alkasso or Calkex.

[fol. 34] 57. The aforesaid agreement beeween Calkex and Alkasso has remained in full force and effect to the date of the filing of this complaint.

58. To carry out the foregoing understanding between Alkasso, Calkex, and their members described in Paragraph 55, and the agreement between them described in Paragraph 56, Calkex and its members have agreed among themselves that they would export alkalis only through Calkex or subject to its direction and consent. This agreement has remained in full force and effect to the data of the filing of this complaint.

59. As part of the conspiracy herein and to effectuate the purposes thereof, Alkasso, Calkex, ICI, and the remaining defendants named herein, have cooperated with each other to eliminate competition in export markets from manufacturers of alkalis in the United States who are nonmembers of Alkasso and Calkex, and from independent exporters of alkalis purchasing such commodities either from members of Alkasso or Calkex or from customers of such members or from such independent manufacturers. The foreign agencies or representatives of Alkasso and ICI have furnished their respective principals with detailed reports made up from information gathered from port agents, shipping companies and shipping documents, relating to the quantities and prices of alkalis shipped into their respective territories by such independent manufacturers and exporters, the names of vessels in which transported, the names of shippers, receiving agents, and, where known, the names of the consignees and the sales prices. Alkasso has also required its members to report to it the names of all independent exporters who sought to purchase alkali [fol. 35] products for export and such inquiries have been systematically referred to Alkasso and Calkex by their respective members. Alkasso and ICI, acting through ICI (N. Y.), have kept each other fully informed as to the activities in export markets of such independent manufacturers and exporters.

60. Whenever Alkasso and ICI have ascertained that such independent manufacturers were exporting alkalis in the various world markets, Alkasso and ICI have taken concerted action as part of the conspiracy herein alleged to eliminate competition from such independent manufacturers. By agreement with each other, defendants have in cases of such competition temporarily depressed the prices of alkalis in such export markets of such a level as to make it unprofitable for such independent manufacturers to export thereto. Alkasso has offered to act as the agent to handle the exports of such independent manufacturers or to purchase all of their alkalis to be exported, and has from time to time reached agreements with such independent manufacturers. Most of such manufacturers have been induced by such methods to accept such offers by Alkasso. By the acts aforesaid Alkasso has succeeded in gaining control of most of the export trade of such independent do-

mestic manufacturers and has thus succeeded in eliminating competition from such source in the export markets of the world and has prevented exports by such manufacturers into exclusive territories allocated as above described or into joint territories except under the quotas and at the prices agreed between Alkasso and ICI as above set forth.

61. The principal obstacle which Alkasso has encountered in achieving complete control of exports of alkalis from the United States has been sales of alkalis made by independent [fol. 36] dealers or exporters who have purchased their supplies either from members of Alkasso or of Calkex or from customers of such members, or from independent manufacturers located in the United States. In some instances such independent dealers have not observed and maintained the prices, quota arrangements, and territorial allocations agreed upon by Alkasso with the other defendants and co-conspirators herein. Said defendants and co-conspirators have designated and referred to such non-cooperating independent exporters as "bootleggers." Alkasso, its officers, agents, and sales representatives located in foreign markets, as part of the conspiracy alleged herein and to effectuate the purposes thereof, have investigated and policed the sales of alkalis made by such independent exporters in foreign markets. Whenever Alkasso and Calkex have determined that such independent exporters were securing their alkalis for export from members of Alkasso or Calkex, they required such members to refrain from selling alkalis to such exporters. Such members have usually thereafter refused to supply alkalis to such exporters. When such independent exporters have obtained material from customers of members of Alkasso and Calkex, their respective members have notified such customers they would refuse to supply them with alkalis if they continued to sell to such independent exporters, and such customers have discontinued such sales because of such threats. Alkasso also has instructed its agents in foreign markets to contact the foreign customers of such independent exporters, to offer to sell them alkalis at prices cheaper than those quoted by such independent exporters, and to disparage the quality of the products offered by such independent exporters. These instructions have been carried out, and such independent exporters have been deprived of their foreign customers. By the acts above alleged de-

[fol. 37] fendants Alkasso, Calkex, and their members, with the assistance of defendants ICI and ICI (N. Y.) have either driven such independent exporters out of business or compelled them to comply with the territorial, quota, and price arrangements hereinabove described. After the competition of such independent operators had been eliminated by such fighting methods, Alkasso and Calkex would thereafter charge such foreign customers the established prices and terms agreed upon by the defendants for such markets.

Stabilization of Domestic Prices

62. As part of the conspiracy herein alleged, the defendants have cooperated and are now cooperating with each other in order artificially and intentionally to enhance and stabilize the price at which caustic soda is sold to dealers and consumers in the United States by manufacturers located therein. As hereinabove alleged Alkasso caused ICI and other European manufacturers to withdraw and refrain from exporting alkalis to the United States. The withdrawal and continued suppression of such exports has eliminated competition from the foreign manufacturers of alkalis and has continuously assisted the defendants in carrying out their program of price stabilization. Throughout the period of time covered by the conspiracy herein alleged, caustic soda has been sold on the open market in the United States by the manufacturers thereof at uniform and stable price levels. As hereinabove alleged, caustic soda is made by the ammonia-soda process and by the electrolytic process. By the electrolytic process caustic soda is produced together with chlorine. Because of the large and growing demand for chlorine, manufacturers of that commodity operating the electrolytic process necessarily have [fol. 38] to make large quantities of caustic soda. The resulting increased supply thereof has threatened substantial reduction in and disruption of the stable price levels at which caustic soda has been sold in the United States. For the purpose of stabilizing the price of such commodity in the United States, Alkasso, Calkex, and their members, acting in concert, have adopted a policy designed to remove from the American market this additional supply of caustic soda produced electrolytically in the manufacture of chlorine and to dispose thereof in foreign markets by all possible means and in preference to other alkalis. The said defend-

ants have carried out and are now carrying out, such policy systematically by means of the agreements between Alkasso and ICI hereinabove set forth and by their practices thereunder. Defendant Alkasso, in negotiating the agreement with ICI and Belgian Solvay described in Paragraph 50 above, insisted upon and obtained a quota sufficient to permit removal from the United States markets of the then increasing amounts of caustic soda produced by the electrolytic process. Defendants Alkasso, Calkex, and their members have sold such additional supplies of caustic soda at the best price obtainable under the territorial, quota, price, and other marketing arrangements made among themselves, with defendant ICI, and with the co-conspirators as hereinabove set forth, but wherever necessary they have dumped such caustic soda in foreign markets at unprofitable price levels in order to carry out their policy aforesaid. To carry out their policy they have further systematically allocated and are now allocating among themselves their respective individual export quotas in such manner as to include under such quotas and remove from the United States markets sufficient caustic soda produced electrolytically by the said members in their manufacture [fol. 39] of chlorine to stabilize the domestic price level of caustic soda. The said individual quotas have been regularly allocated upon the following basis: In the case of alkalis, whether soda ash, caustic soda, or sodium bicarbonate, produced by the ammonia-soda process, individual quotas have been based on the relative proportions of each member company's total domestic sales (at first the basis was each member's total production) of the alkali in question during the two years prior to any current year. In the case of caustic soda produced electrolytically in the production of chlorine, a member's total percentage has been fixed on the basis not only of such member's domestic sales of all caustic soda but also of such member's accumulated stocks and estimated future production of electrolytic caustic soda during the current year, for the purpose and with the effect of removing by-product caustic soda from the domestic market and disposing of it in foreign markets. Furthermore, for this purpose, member companies producing caustic soda electrolytically in the production of chlorine have been systematically given increases in their quota to include additional amounts of caustic soda so produced by such member in any current year in excess of

the estimate of production used in the first instance as the basis of such member's quota. The defendant members of Alkasso and Calkex manufacturing alkalis by the ammonia soda process have in such cases regularly accepted reduced quotas to permit such absorption and exportation of the additional supply of caustic soda resulting from the manufacture of chlorine. Likewise the member companies using both that process and also the electrolytic process have regularly accepted reductions in the amounts of caustic soda to be exported by them manufactured by the ammonia-soda process. By the methods aforesaid, the said defend- [fol. 40] ants have enhanced, stabilized, and maintained at uniform and noncompetitive levels the price of caustic soda sold in the United States.

63. The conspiracy herein alleged is still continuing and the defendants are presently carrying out said conspiracy and the several agreements and understandings hereinabove alleged. Alkasso and its members and, after its formation, Calkex and its members have refrained from exporting alkalis from the United States into territory allocated exclusively to ICI, Belgian Solvay, or I. G. Farben. ICI, Belgian Solvay, and I. G. Farben have refrained from exporting alkalis into the United States and to the other territory allocated exclusively to each other and to Alkasso and its members. Alkasso, its members, ICI, and, after its formation, Calkex and its members have also observed the quota, price, agency, and other export and marketing arrangements for the joint territories established by the several agreements hereinabove referred to in paragraphs 43 through 58. Whenever any of the companies has supplied more than its quota share in one of the joint territories, it has accepted a corresponding reduction from its quota in another joint territory in favor of the other company or has made other arrangements satisfactory to the other party to adjust the quota positions in accordance with the terms of the said agreements. The members of Alkasso have carried out their agreements with it described in paragraph 53 and in compliance therewith have accepted and abided by the individual quotas allocated to each of them from time to time for sale of alkalis in joint terirtory shared with ICI as aforesaid and in exclusive Alkasso territory, and in compliance with their said agreements with Alkasso have exported only through it or with

its consent and at the prices prescribed by it. Defendant [fol. 41] Calkex has at all times complied with its understanding and agreement with defendant Alkasso described in paragraphs 55 and 56 above and has accepted and abided by the export quotas allocated to it thereunder by Alkasso and has complied with the export marketing requirements therein provided. The members of Calkex have at all times complied with their agreement with Calkex described in paragraph 58 above and pursuant thereto have accepted and abided by the individual export quotas allocated to them by Calkex as their share of exports out of the quotas allocated to Calkex from time to time by Alkasso, and have exported only with the consent of Calkex and through the agencies, at the prices, and to the territories permitted by it under their agreement. The defendants are continuing to engage in the herein alleged unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce in alkalis, and are continuing to carry out the aforesaid contracts, agreements, and understandings in restraint of such trade and commerce, all in violation of Section 1 of the Sherman Antitrust Act. None of the alleged illegal acts of the defendants are exempted from the provisions of the Sherman Antitrust Act by the provisions of the Webb Export Trade Act. Defendants will continue to engage in the said unlawful combination and conspiracy and to carry out the said illegal contracts, agreements, and understandings unless therefrom restrained by order of this Court.

VI. Effects of the Combination and Conspiracy

64. As intended by the defendants, the results of the aforesaid combination and conspiracy and the acts of the defendants in effectuation thereof, and of the contracts, [fol. 42] agreements, and understandings hereinabove described have been to restrain the foreign and domestic trade and commerce of the United States as follows:

1. Competition by Alkasso, Calkex, and their members with ICI and European producers of alkalis in the manufacture and marketing of alkalis has been eliminated throughout the markets of the world.

2. Exports of alkalis by ICI, Belgian Solvay, and I. G. Farbenindustrie to the United States and its territories and possessions have been wholly eliminated.

3. Exports of alkalis from the United States by Alkasso, Calkex, and their respective members, and other manufacturers of alkalis in the United States, to many markets of the world have been wholly eliminated.

4. Exports of alkalis from the United States by Alkasso, Calkex, and their respective members, and other manufacturers of alkalis in the United States, to many markets of the world have been curtailed and restricted by quota arrangements entered into between Alkasso and ICI for such markets.

5. Competition by Alkasso and its members with Calkex and its members in exports of alkalis from the United States, and competition with the defendants by other United States manufacturers in exports of alkalis from the United States have been eliminated.

6. The production of alkalis within the United States has been curtailed and limited.

7. The manufacturers of alkalis in the United States who were not members of Alkasso and Calkex have been [fol. 43] prevented from competing with Alkasso, Calkex, ICI, Belgian Solvay and I. G. Farbenindustrie in the various markets of the world.

8. Independent exporters of alkalis in the United States have been prevented from engaging in the export of such commodities.

9. The prices at which caustic soda is sold in the United States have been enhanced, stabilized and maintained at uniform and arbitrary price levels.

VII. Prayer

Wherefore, the plaintiff prays:

1. That the aforesaid combination and conspiracy, contracts, agreements and understandings in restraint of trade be adjudged and decreed to be unlawful, and that the contracts, agreements, understandings, and practices alleged in this complaint be adjudged and decreed to be in violation of Section 1 of the Sherman Antitrust Act.

2. That the Court adjudge and decree that the defendants have combined and conspired to restrain the foreign

and domestic trade and commerce of the United States in violation of Section 1 of the Sherman Antitrust Act.

3. That the defendants and each of them and their officers, directors, agents, representatives, and all persons and corporations, acting or claiming to act on behalf of them, be perpetually enjoined from combining or conspiring or agreeing to restrain trade and commerce in alkalis among the several states of the United States or with foreign na- [fol. 44] tions, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships, or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving, or renewing any of the violations of the Sherman Antitrust Act hereinbefore in this complaint set forth and described.

4. That the agreement between defendants Alkasso, its members and ICI, hereinbefore alleged and described in paragraph 43, and the agreement, to the extent it is still in effect, between defendants Alkasso, its members, and ICI and co-conspirators I. G. Farben and Belgian Solvay hereinbefore alleged and described in paragraph 48, and the agreement between defendants Alkasso, its members, and co-conspirators ICI and Belgian Solvay hereinbefore alleged and described in paragraph 50, and the agreement between Alkasso, its members and ICI hereinbefore alleged and described in paragraph 52, and the understanding and agreement between Alkasso, Calkex, and their members hereinbefore alleged and described in paragraphs 55 and 56, be adjudged to be illegal and ordered terminated and cancelled.

5. That the defendants and each of them and their officers, directors, agents, representatives, and all persons and corporations, acting or claiming to act on behalf of them, be perpetually enjoined from carrying out, claiming any rights under, or entering into any contract, agreement or understanding with any citizen of any foreign country or any company or corporation therein situated, in any manner restricting the defendant's exports of alkalis from the United States division of export markets, allocation of territories, fixing of prices in export sales, or fixing or observing any export quotas.

[fol. 45] 6. That the defendants (other than ICI and ICI (N. Y.)) and each of them and their officers, directors,

agents, representatives, and all persons and corporations, acting or claiming to act on behalf of them, be perpetually enjoined from selling alkalis exported from the United States in any foreign markets through ICI (N. Y.) or through any agent or dealer selling alkalis for or on behalf of ICI or ICI (N. Y.).

7. That the defendants and each of them and their officers, directors, agents, representatives, and all persons and corporations, acting or claiming to act on behalf of them, be perpetually enjoined from carrying out, in concert with any foreign company or corporation or by concerted action among any defendants, any systematic reduction of prices of alkalis, exported by defendants from the United States and sold in foreign markets, for the purpose of impairing or destroying the export trade of any United States manufacturer, dealer or distributor, or to eliminate any domestic competitor.

8. That each defendant (other than ICI and ICI (N. Y.)) and the officers, directors, agents and representatives of such defendant, and all persons and corporations acting or claiming to act on behalf of such defendant, be perpetually enjoined from refusing to sell alkalis, to the extent available in the regular course of such defendant's business, to dealers or distributors ordering such commodities for export, or intending to export the same, from the United States to any country not an enemy of the United States, where such dealers or distributors make appropriate payment or tender of payment at such defendant's current export prices.

[fol. 46] 9. That defendants and each of them, and their officers, directors, agents, representatives, and all persons and corporations, acting or claiming to act on behalf of them, be perpetually enjoined from investigating, gathering information relative to the activities of, circulating information concerning and reporting to each other about shipments and sales in foreign commerce by other manufacturers and by distributors and dealers of alkali products located in the United States, when the intent and purpose of such investigations and reports is to control, limit and suppress the competition of such other United States manufacturers, distributors and dealers.

10. That the defendants Alkasso and Calkex, their members and all officers and agents acting for them, be enjoined from referring to Alkasso or Calkex all inquiries and orders received from domestic distributors and dealers for alkali products to be exported from the United States and distributed and sold in foreign commerce, or from refusing to sell alkalis to any person because such person has failed to abide by quota arrangements or to observe exclusive world markets, or because such person has sold such products at prices and terms other than those established by said defendants and co-conspirators.

11. That the defendants and each of them and their officers, directors, agents, representatives, and all persons and corporations, acting or claiming to act on behalf of them, be perpetually enjoined from carrying out any plan or program for removal from United States markets, and disposal by export from the United States, of electrolytically produced caustic soda in preference to other alkalis, or from adopting or carrying out any practices or [fol. 47] measures in the export of alkalis from the United States having the purpose and effect of stabilizing the prices at which alkalis are sold in the United States.

12. That the plaintiff have such other, further and more general relief as may be necessary in the premises.

13. That, pursuant to Section 5 of the Sherman Act, an order be made and entered herein requiring such of the defendants as are not within this District to be brought before the Court in this proceeding as parties defendant and directing the marshals of the district in which they severally reside to serve summons upon them:

Herbert A. Berman, Harold L. Schilz, Patrick A. Gibson, Special Assistants to the Attorney General.

Francis Biddle, Attorney General. Wendell Berge, Assistant Attorney General. Lawrence S. Apsey, Special Assistant to the Attorney General.

[fol. 48] EXHIBIT "A" TO COMPLAINT

Notes of Meetings in New York on 27th, 28th & 29th February 1924

Present Mr. Eli Winkler, Mr. H. G. Carrel & Mr. E. B. Finch of the United States Export Alkali Association and Mr. J. G. Nicholson & T. H. Bell of Messrs. Brunner Mond & Co. Ltd.

MEXICO

It was finally agreed that the Association should forthwith appoint as their Agents in Mexico, Messrs. Wm. Young & Co. who will continue to act for B. M. & Co. Ltd. and The U. A. Co. Ltd. in exactly the same manner as heretofore. Messrs. Young would be asked to employe in some manner suitable to all parties, Mr. Roberts & Mr. Lomelin, who have previously represented the Association. A cable was sent to Messrs. Young offering them the Agency on these terms & they replied accepting same. Mr. Finch will immediately proceed to Mexico to confirm the arrangement, assist in the initial stages & in company with Messr. Young, decide what prices the market shall pay.

In consideration for the above & having regard to comparative sales made by American & British manufacturers during recent years, it was agreed for the present that the following quotas per annum of Ash & Caustic should be observed:—

		Ash	*Caustic*
British (U A Co Ltd)	40% with a maximum of	1500	3500
Americans	60 or balance say	2250	5250
Any supplies Mexico may require in excess of..... shall be supplied exclusively by the Americans.		3750 tons	8750 tons

CUBA

It was agreed that neither The United Alkali Co. Ltd. or Messrs. Brunner Mond & Co. Ltd. should quote prices or [fol. 49] ship Ash or Caustic to Cuba till further notice.

South America

It was agreed that as from the 1st January 1924 the Association should not ship annually more than Tons 6500 Caustic Soda & Tons 1000 Ash to South America & that their exports of Caustic Soda should be made at regular intervals & the quantities sent to each market must not exceed the following:—

Agents	*Market*	*Tons per annum*	*Approx per month*	*Tons shipped or in course of shipment since 1/1/24*
T. J. Williams	Argentina	3400	280	900
idem	Uruguay	400	33	130
Grace & Co	Rio de Janeiro	2400	240	150 to Grace
Matarazzo	Santos for Sao Paulo			
idem	Pernambuco	100	8	30
idem	Bahia	200	8	89
	West Coast & other ports	nil	"	"
		6500		

The 1000 Tons Soda Ash may be shipped as convenient to any of the above markets. The Association agree that any shipments of Caustic Soda or Soda Ash that may be made by U. S. A. manufacturers outside the Association to South American ports shall, on proof of such shipments, be included in the Association quota & deducted from the tonnage of the market affected.

The Agents of Messrs. B. M. & Co. Ltd. & The U. A. C. Ltd. will be advised to make room for the annual tonnage of U. S. A. Caustic Soda corresponding to their respective markets. All Agents throughout S. America will be instructed to raise their selling prices on Caustic as soon as circumstances permit to a flat rate of say £18-10-0 per ton [fol. 50] C. I. F. any port which at exchange dollars 4.30 equals $80.00 per ton—Small drums 30/—extra.

As the Agents of the Association should experience no difficulty in placing their allotted tonnage of Caustic at the ports under their control their principals are instructing them to follow the prices of the Agents of B. M. & Co. Ltd. and the U. A. Co. Ltd.—This likewise applies to Ash.

In case of competition from outside European or American sources, cables will be exchanged between B. M. & Co. Ltd. Buenos Aires & The Association in New York.

The price finally agreed at which British & Association Caustic Soda shall be sold to Matarazzo & Co. Santos for Sao Paulo is as follows:—

	Davidson Pullens British Prices	*Grace's & Association Prices*	*Terms Payment-level*	*Agreed-maximum Tonnage per annum* British	U S A
To Matarazzo	£17-10-0	Equivalent of British	Net Cash 30 days after arrival steamer	1000	1500
To Dealers minimum	£18-7-6	do	usual local	no limit	1000 for Grace
To general trade minimum	£18-10-0	do	do	no limit	
					2500 Tons

Matarazzo & Co. is not to receive more than a total of tons 2500 from all sources per annum. Advice is being given accordingly to Messrs. Davidson Pullen & Co., Messrs. Matarazzo & Co., and Messrs. Grace & Co. & Mr. Olsburgh (UACo).

By Tons it means 2240 lbs., 1016 Kilos or long Tons.

New York,
29th February 1924.

[fol. 51] EXHIBIT "B" TO COMPLAINT

Copy

IMPERIAL CHEMICAL INDUSTRIES LTD.

Imperial Chemical House, Millbank, Westminister, S. W. 1

22nd October, 1929

The United States Alkali Export Association

New York.

DEAR SIRS:

This letter is for the purpose of confirming the results of our conversations with Mr. Finch regarding joint exports of alkali products as 58%.

It is understood and agreed that under the proposed arrangement, commencing on the 1st January, 1930, we include Magadi shipments in our tonnage.

The U. S. A. share of the joint exports of all alkali products from the U. S. A. and from the United Kingdom—excluding our shipments to the Irish Free State—shall be for the year:

1930	22½%
1931	24%
1932	25%

It is understood there will be complete co-operation between us in order to avoid competition in any part of the [fol. 52] world, and we confidently expect therefore that, apart from your responsibility for the tonnage of U. S. A. exports, you will take the necessary steps to control Inyo and any other makers of alkali products in the U. S. A., so that by the stabilization of prices we may achieve some benefit from our arrangement with you.

We shall continue, of course, to exchange with you each quarter statistics of shipments from the U. S. A. and from this country, so that we may consider how it will be possible to adjust shipments in order that you may attain the agreed U. S. A. export quota.

Further, we should like to put on record that, while there is no agreement after the end of 1932 and Mr. Finch has made no commitments on your behalf after that date, we have during our discussions expressed very strongly our view that a continuance of friendly co-ordination on the above basis is only possible provided that the recent steady increase in your percentage should not continue thereafter and that, when you have reached 25%, you should be prepared to continue co-operation with us on that basis for a further period of years.

Yours faithfully, Signed: J. G. Nicholson.

	ICI	*Alkasso*		
1927	18.18% (1)	1929—21.6% (1)		1—excludes Mag
	16.2 % (2)			2—Includes "
1928	22.01% (1)			
	18.08% (2)			

[fol. 53] EXHIBIT "C" TO COMPLAINT

AGREEMENT BETWEEN ALKASSO AND I. C. I.

1. Three years from May 1, 1933 to April 30, 1936, and to continue thereafter unless terminated by six months' notice by either party.

2. The markets of the world shall be apportioned as follows. Of the total joint deliveries:

	Alkasso		*I. C. I.*	
Mexico	80%		20%	with maximum 5000 T.
China	7%	with maximum 4000 T	93%	
India	3%	with maximum 2000 T	97%	

3. Routine shipments from England to Continental areas to continue to be included in world figures, but any shipments to such markets which might be dictated by trade reciprocity or inter-European arrangements of I. C. C. to be considered outside of the world tonnage total, although to be reported for purposes of record.

4. In all all other markets not specially mentioned Alkasso and I. C. I. shall sell at agreed prices (where possible to be agreed locally from time to time). In case of dispute the party with the major interest in the market to decide.

5. The I. C. I. undertake that shipments by the Magadi Soda Company shall not exceed the proportions to each market shipped by the M. S. Coy, under the Magadi-I. C. I. sales agreement.

6. Figures showing total shipments to each market by both parties (excluding Magadi) shall be exchanged quar- [fol. 54] terly and including the above mentioned quotas shall be divided as follows:

Alkasso	*I. C. I.*
25%	75%

7. The I. C. I. shall give Alkasso delivery instrutcions for 5,000 tons during the three years period at any time suitable

to market requirements in order to liquidate all over-delivery at Dec. 31, 1932. Such shipments shall not be calculated as part of Alkasso's quota under this agreement.

8. Although the agreement is dated from May 1st the actual provisions as to quotas shall date from Jan. 1, 1933.

9. In addition to the shipment figures for quota purposes similar statements shall be prepared by both parties based on actual sales in each market.

10. Mexico	To be sold by joint agent.
China	To be sold by I. C. I. China, Ltd.
India	To be sold by Alkasso agent and I. C. I. India, Ltd. in agreement as to prices.

11. In view of the elimination of Magadi shipments from the joint tonnage, Alkasso are not responsible if there is any resumption of shipments of Natural Soda from western ports of U. S. A. inasmuch as there are no material exports at present and Alkasso express the opinion that there are not likely to be any.

(Meetings of 5/8 and 5/9/33 at Uptown Club, 60 East 42nd St., N. Y. City. Nicholson, Wallace, White for I. C. I., Kienle, Taylor, Hooker, Winkler, Chadwick, Finch for Association.)

[fol. 55] EXHIBIT "D" TO COMPLAINT

ALKASSO-BRITISH AGREEMENT

July 1, 1936

(1) The parties to the agreement are I. C. I., Solvay and Alkasso, and meetings between representatives of the parties shall be held annually alternately in Europe and the U. S. A.

(2) This agreement commences on July 1st 1936 and runs until June 30th 1941. On or after June 30th 1940 one year's notice of termination may be given by any of the parties.

(3) Exclusive territories as follow are allotted to the parties. Each party assumes responsibility for and will count in its quota any exports from its exclusive territory.

Exclusive territories:

Solvay—Continent of Europe (excluding Russia).

I. C. I.—British Empire (excluding Canada). Egypt and Levant. Irak and Iran.

Alkasso—Canada, Mexico, Cuba, Haiti, and San Domingo, Dutch East Indies, Dutch West Indies (Effective 1/1/39).

[fol. 56] (4) It will not be considered a breach of clause). Effective 1/1/39.

3. If modified Sodas sold under proprietary brand name be shipped each year to exclusive territories in quantities not exceeding the average annual shipment made to each individual market over the period 1933-1935 inclusive.

(5) Joint territories as follow will be shared by I. C. I. and Alkasso in the proportions shown.

	I. C. I.	*Alkasso*
China	80	20
Japan	65	35
River Plate	65	35
Brazil	75	25
Other (principally Rest of S. America	75	25
(Effective 1/1/39)		
Central America	[—]*	[—]*
[—]*		
Bahrein Island	60	40
(Retroactive to 7/1/36)		

(Jan. 21, 1938) "60% : 40% division still stands for any tonnages shipped in excess of the 1933/35 average."

It shall not be considered a breach of this clause if Solvay ship to colonies or protectorates of European countries in which they have factories provided the quantities do not exceed the average annual shipments during the period 1933/35.

In the case of China, Japan, River Plate and Brazil these percentages shall hold provided that the joint shipments in any one year to the respective markets do not exceed the

---

*Struck out in copy.

[fol. 57] average shipments for the triennial period 1933, 1934, 1935.

These figures are agreed to be:

China	50,955 tons	as 58%
Japan	55,033 "	" "
River Plate	42,426 "	" "
Brazil	43,396 "	" "

If, however, the joint shipments in any future contractual year to any one of these markets shall exceed the triennial average shown above, the excess over the average shall be divided 60% to I.C.I. 40% to Alkasso.

(6) Each party shall use its best endeavours to prevent shipments from its exclusive market to markets exclusive to other parties and to adhere to the agreed quotas in the joint markets.

(7) In the event of leakage to an exclusive market, compensation will normally be made by arranging shipment to a joint market, such shipment to be regarded for quota purposes as having been made by the offending party.

(8) In the joint markets the position will be reviewed at the end of each contractual year, and the over and under deliveries will be carried over into the succeeding year. The over delivered party will make every endeavour to reduce his shipments so as to correct the quota position.

(9) If for any reason one party declines its share of business in a joint market, then the other party shall have the right to supply without penalty.

[fol. 58] (10) The three parties agree to consult before entering into any arrangement regarding alkali exports from Japan.

In the event of any arrangement being made with the Japanese producers, such arrangement shall as far as possible be on a territorial basis and exclusive territories shall be respected.

(11) In the event of either of the parties erecting an alkali works in its exclusive territory outside the U.K. or Europe, no exports to be permitted from such works to territory covered by this agreement.

(12) In the event of either of the parties erecting an alkali works in the joint territories with the result that imports are no longer possible, then the other party shall have the option either—

(a) of capital participation in the proportion of its quota in that market, or

(b) of equitable compensation on terms to be mutually agreed.

If the parties fail to agree on an arrangement satisfactory to both, either shall have the right to give one year's notice of termination of this agreement.

(13) In the event of such circumstances arising either through government action or otherwise which render it impossible for any one of the parties to observe any of the portions of this agreement regarding exports, the parties undertake to meet and use their best endeavours to arrive at a modification of this agreement which will not prejudice the general position of any one of them.

June 11th, 1936. New York, N. Y.

[fol. 59] EXHIBIT "E" TO COMPLAINT

California Alkali Export Association, 1206 Pacific Mutual Bldg., Los Angeles, California

December 2, 1937.

United States Alkali Export Assoc., Inc., 11 Broadway, New York, N. Y.

Atten.: Mr. E. V. Finch

GENTLEMEN:

This will confirm recent conversations with respect to a cooperative export program as between the California Alkali Export Association and the United States Alkali Export Association which has been outlined in accordance with memorandum attached hereto.

Very truly yours, California Alkali Export Association, By D. B. Scott, President.

DBS:M.
Encl.

[fol. 60] 1. Markets

It is understood and agreed that the Association's exports of soda ash will be confined to all Latin American markets; also Java, China, Japan, the West Indies and Western Canada. New Zealand will remain as an exception during the first half of 1938 when the maximum amount of ash shipped to that market will be 100 tons.

In India this Association has the privilege of shipping 4,000 long tons during 1938, 2,000 long tons during 1939, and 1,000 long tons during 1940. It is understood and agreed that the sale of this material will be made direct to Imperial Chemical Industries, Ltd., of India; this company, for their own account, will pay the local Association agent in India his regular agent's commission. During the life of these shipments or for such time as may be determined by this Association, orders for Indian tonnage will be transmitted from London via New York to the Association and the United States Alkali Export Association will give routine attention to all essential details appertaining to this special business, etc., etc.

The Association agent in India will have authority to act as liaison officer in Association relations with the Indian British Company particularly with respect to price levels and any other details which might be required of him.

2. West Indies and Central America

Miscellaneous small sales effected in this area independently of the Association but in co-operation with New York will be in accordance with established price schedules maintained between New York and London. This applies [fol. 61] specifically to those small areas where United States Alkali Export Association does not maintain agencies.

3. Agencies

Foreign agents of the United States Alkali Export Association will be utilized exclusively in the distribution of export sales. The following exceptions will prevail:

Independent sales will continue in Cuba during the first half of 1938.

Independent sales will continue temporarily through Association agents in Rio de Janeiro and Santos, Brazil, until

developments permit of distribution solely via United States Alkali Export Association agents.

Independent sales to the Argentine, in the amount of 1,000 tons, will be made during the first six months of 1938 only, after which subsequent sales will be made through the agents of United States Alkali Export Association.

With respect to China, as the present situation does not permit of any form of definite agency distribution, no commitment is made as to any Association sales policy in that market, it being understood this angle will be adjusted satisfactorily when conditions permit.

4. Credits

All United States Alkali Export Association agents will assume full and complete obligations under del credere. This also applies to the British Company in India or other [fol. 62] British overseas company which might be utilized at any time.

5. Freight Rates

The United States Alkali Export Association will continue, on behalf of all concerned, its past policy of maintaining minimum ocean rates to all foreign markets, cooperating in every respect with this Association.

6. Distribution

The following tentative distribution of tonnage by markets is reported as a preliminary matter of record and it is understood will be subject to any necessary revision:

Argentine	2,000 tons
Brazil	2,000 "
Peru and Chile	400 "
Mexico	3,000 "
Canada	400 "
Japan	1,500 "
Java	2,000 "
India	4,000 "
Total	15,300 "

7. Japan

The Association recognizes the strategic policy as established between New York and London in combating

shipment of both caustic and ash to the Japanese market. Under this formal recognition, it has subscribed to 1,500 tons of ash during 1938 for that month.

The provision of this memorandum will continue in effect until notification of cancellation be given by either party sixty days prior to effect cancellation date.

[Vol. 63] EXHIBIT "F" TO COMPLAINT

United States Alkali Export Association, Inc.

11 Broadway

New York, N. Y.

The Ninety Ninth Meeting of the Executive Committee of United States Alkali Export Association, Inc., was held at the Hotel Barclay, 111 East 48th Street, Borough of Manhattan, New York City, July 31st, 1941, at 10:30 A. M.

Present:

On behalf of the Association:

Messrs. J. A. Kienle, Chairman; G. S. Cooper, Eli Winkler,

also E. V. Finch, President of the Association.

On behalf of Imperial Chemical Industries Ltd.:
Messrs. Lincoln Steel, J. W. Gibb, E. J. Barnsley.

Tonnage for Latin American Markets: Export Quotas:

Meeting was convened to give further consideration to the Latin American situation as covered by certain agreements of the Committee in meeting held two days before, i.e., Tuesday, July 29th, 1941.

[fol. 64] Mr. Steel stated that previous arrangements were nullified by London cable advices of July 30th to the effect that the British Government had relaxed existing shipping restrictions—consequently I.C.I. were free to ship full requirements to agents in River Plate markets (Argentina, etc.), a majority of agents' requirements in Brazil, and total requirements in Bolivia. Further, depending upon shipping conditions, shipments would move to China agents

in nominal quantities, but not sufficiently to meet full requirements. While not on the agenda of the previous meeting, Mr. Steel advised that reasonable shipments would be permitted to Canada by the British Government in the event material should be required.

In view of the foregoing, it was agreed that arrangements set up at the previous conference, held July 29th, 1941, would be considered as cancelled, although they could serve as a basis for any renewed discussions or exchanges in the event past permit restrictions by British Government might be re-imposed.

New Quota Arrangements:

Brazil:

It was agreed, effective July 1st, 1941, Brazilian quota would be 70% for I.C.I., and 30% for Alkasso on the basis of sales made, (not shipments)—further, in the event I.C.I. sales, due to inability to secure material, should drop below 60% of the market, the Association would supply I.C.I. agents with sufficient tonnage to enable them to maintain a minimum quota position in sales of 60% versus the original 70%. Under such conditions, the Association would receive a maximum of 40%.

[fol. 65] River Plate:

It is agreed, effective July 1st, 1941, River Plate quota would be 60% for I.C.I. and 40% for Alkasso on the basis of sales made, (not shipments)—further, in the event Alkasso sales, due to shortage of material, should drop below 40% of the market, I.C.I. would supply the Association agents with sufficient tonnage to enable them to maintain a minimum quota position in sales of 40%.

Peru:

It was agreed, effective July 1st, 1941, quota division in Peru would be 60% for I.C.I. and 40% for Alkasso.

Venezuela and Colombia:

It was agreed, effective July 1st, 1941, quota position in both Venezuela and Colombia would be 50% for I.C.I. and 50% for Alkasso.

Miscellaneous Markets—China, Central America, Panama, The West Indies, etc.:

It was agreed no attempt could be made to establish quotas in such areas, and any business involved would be handled according to past practice, shipping facilities and material available, except British Empire markets: the latter to be handled by I.C.I. unless they should call upon Alkasso for any assistance.

India:

Notwithstanding the termination of the old I.C.I.-Alkasso agreement June 30th last, and the consequent termination [fol. 66] of any obligation by I.C.I. to supply material to National Aniline & Chemical Co. in India, (former agents for Alkasso), Mr. Steel stated his full agreement to recommend that I.C.I. in India continue to furnish material as heretofore, except the volume would have to be on a prorated basis because the British Government had restricted I.C.I. shipments, thereby creating a proportionate rationing of tonnage in all British Empire markets. No definite figure could be set down, but Mr. Steel expressed the belief that whatever reduction was made in the original amount of 2,500 tons as 58% would be necessarily proportionate and therefore quite fair. (I.C.I. India are continuing to furnish NACCO with material on a reduced basis).

Iran:

The Association agreed, provided tonnage and shipping facilities permit, to supply material for Iran, via the Persian Gulf, utilizing British agents, allowing a 5% commission and receiving payment by irrevocable letter of credit at New York.

Other Quota Arrangements:

It was agreed inasmuch as all previous quota arrangements had terminated, that any tonnage overage on the part of the Association would be considered as cancelled, there remaining as of July 1st, such arrangements as are specified herein, with no change effecting exclusive markets, or such markets where Alkasso might be furnishing 100%, by selling through I.C.I. agents.

Brazil-Argentine Tonnage Exchange:

Respecting past sale of 1,500 tons of caustic by the Association to I.C.I. in Brazil at $59.00 per ton c.i.f., and [fol. 67] British agreement to sell a similar quantity on like terms to Alkasso's agent in Buenos Aires:

The British agreed to consider this matter, having no objection to a corresponding Argentine shipment, provided tonnage and shipping facilities permitted.

Shipping Information:

To enable Alkasso to more accurately gauge its tonnage position, the British officials agreed to advise by cable, the volume of shipments cleared from time to time to Brazil, Argentine, and China.

Miscellaneous:

Mr. Steel discussed the Argentine situation, explaining that Duperial and Celulosa (a local paper company), each owned 50% of Electrochlor, a selling agency with whom Duperial had contracted for the selling rights for caustic soda, chlorine, and miscellaneous products; further, that Celulosa own the cell room which is operated by an independent outfit, supplying Electrochlor with chlorine—further, chlorine capacity was about 45 tons daily, with an estimated maximum surplus of caustic soda for yearly sale of 6,000 tons—said figure contingent upon the activities and consumption of chlorine by Celulosa.

Bunge & Born Electrolytic Production:

Discussion of Bunge & Born's electrolytic production estimated at a possible 5-tons maximum daily, offered a total local production close to 8,000 tons of caustic for sale [fol. 68] yearly—this without figuring possible further expansion, concerning which details are unknown.

Williams Quimica y Tecnica, S.R.:

I.C.I. requested the Association keep them informed relative to any expansion in the electrolytic production of Williams Quimica, Association agents, at present rated around 1-ton daily, all of which is going into sodium hypochlorite.

Adjournment:

There being no further business to come before the meeting, it was, upon motion duly made and seconded, Adjourned.

——— ———, Chairman.

[fol. 69] In United States District Court

[Title omitted]

Motion to Dismiss Complaint for Lack of Jurisdiction of Subject Matter

The defendants, United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., Diamond Alkali Company (Inc.), Dow Chemical Company, Inc., Hooker Electrochemical Company (Inc.), The Mathieson Alkali Works (Inc.), Niagara Alkali Co., Pennsylvania Salt Manufacturing Co., Southern Alkali Corporation, Westvaco Chlorine Products Corporation, Inc. and Wyandotte Chemicals Corporation, by their respective undersigned attorneys, hereby move, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the complaint in the above-entitled action upon the ground that this Court does not have jurisdiction of the [fol. 70] subject matter thereof because, under the provisions of Title 15, Sections 62 and 65, of the United States Code, exclusive jurisdiction is vested, in the first instance, in the Federal Trade Commission of the matters complained of in the complaint herein, and for such other and further relief as the Court may deem just and proper.

Dated, April 26, 1944.

Cravath, Swaine & Moore, by Wm. Dwight Whitney, a Member of the Firm, Attorneys for Defendant, United States Alkali Export Association, Inc., 15 Broad Street, New York 5, N. Y. Leland Hazard, Attorney for Defendants, Pittsburgh Plate Glass Company (Inc.) and Southern Alkali Corporation, Grant Building, Pittsburgh, Pa. Reed, Smith, Shaw & McClay, Attorneys for Defendant, Diamond Alkali Company (Inc.), Union Trust Building, Pittsburgh, Pa. Calvin A. Campbell, Attorney for Defendant, Dow Chemical Company, Inc., Midland, Michigan. Robert T. McCracken, Attor-

ney for Defendant, Pennsylvania Salt Manufacturing Co., 1421 Chestnut Street, Philadelphia, Pa. [fol. 71] Lewis & Watkins, Attorneys for Defendant, Wyandotte Chemicals Corporation, Ford Building, Detroit, Michigan. Wm. Dwight Whitney, Attorney and of Counsel for Defendants, Pittsburgh Plate Glass Company (Inc.); Southern Alkali Corporation; Diamond Alkali Company (Inc.); Dow Chemical Company, Inc.; Pennsylvania Salt Manufacturing Co.; and Wyandotte Chemicals Corporation, 15 Broad Street, New York, N. Y. Dwight, Harris, Koegel & Caskey, by Ralph S. Harris, a Member of the Firm, Attorneys for Defendant, Church & Dwight Co., Inc., 100 Broadway, New York, N. Y. Sage, Gray, Todd & Sims, by Wm. E. Sims, a Member of the Firm, Attorneys for Defendant, Hooker Electrochemical Company (Inc.), 49 Wall Street, New York, N. Y. Chadbourne, Wallace, Parke & Whiteside, by Horace G. Hitchcock, a Member of the Firm, Attorneys for Defendant, The Mathieson Alkali Works (Inc.), 25 Broadway, New York, N. Y. Root, Clark, Buckner & Ballantine, by John E. F. Wood, a Member of the Firm, Attorneys for Defendant, Niagara Alkali Co., 31 Nassau Street, New York, N. Y. Wise, Corlett & Canfield, by Byrd D. Wise, a Member of the Firm, Attorneys for Defendant, Westvaco Chlorine Products Corporation, Inc., 122 East 42nd Street, New York, N. Y.

[fol. 72] In United States District Court

[Title omitted]

Order Approving Stipulation—May 27, 1944

Upon consideration of the stipulation between counsel for plaintiff and counsel for defendants, California Alkali Export Association, West End Chemical Co. (Inc.) and Pacific Alkali Co. (Ltd.), attached hereto, and of the motion to dismiss dated April 26, 1944 and filed herein April 26, 1944 it is

Ordered that said stipulation be and hereby is approved and that the time of California Alkali Export Association,

West End Chemical Co. (Inc.) and Pacific Alkali Co. (Ltd.), defendants herein, to answer, plead or otherwise move with respect to the complaint herein is hereby extended to and including the 30th day after the entry of an order upon the aforesaid motion to dismiss.

Coxe, United States District Judge.

Dated: New York, N. Y., May 27, 1944.

[fol. 73] In United States District Court

[Title omitted]

Stipulation re extension of Time to File Answers etc.

It is hereby stipulated by and between plaintiff and defendants California Alkali Export Association, West End Chemical Co. (Inc.) and Pacific Alkali Co. (Ltd.), by their respective undersigned counsel, that it shall be assumed that said defendants have filed herein a motion to dismiss the above entitled action upon grounds identical with those set forth in the motion to dismiss dated April 26, 1944 and filed herein on April 26, 1944, by United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., Diamond Alkali Company (Inc.), Dow Chemical Company, Inc., Hooker Electrochemical Company (Inc.), The Mathieson Alkali Works (Inc.), Niagara Alkali Co. Pennsylvania Salt Manufacturing Co., Southern Alkali Corporation, Westvaco Chlorine Products Corporation, Inc., and Wyandotte Chemicals [fol. 74] Corporation, and that any determination made or any order entered by the Court on said motion shall extend and apply to said defendants, California Alkali Export Association, West End Chemical Co. (Inc.) and the Pacific Alkali Co. (Ltd.), with the same force and effect as if they had been parties to said motion or had actually filed such a motion in their own behalf.

It is further stipulated that the time of said defendants, California Alkali Export Association, West End Chemical Co. (Inc.) and Pacific Alkali Co. (Ltd.), to answer, plead or otherwise move with respect to the complaint herein shall be extended to and including the 30th day after the entry

of an order on said motion to dismiss, and that an order may be entered herein to that effect.

Herbert A. Berman, Special Assistant to the Attorney General. Willard P. Scott, Attorney for Defendants California Alkali Export Association, West End Chemical Co. (Inc.), Pacific Alkali Co. (Ltd.)

Dated: New York, N. Y., May 26th 1944.

[fol. 75] In United States District Court, Southern District of New York

Civ. 24-464

United States of America, Plaintiff,

against

United States Alkali Export Association, Inc., et als, Defendants

Appearances:

Herbert A. Berman and Manuel M. Gorman, Esqrs., Special Assistants to the Attorney General;

Aute L. Carr, Bert C. Dedman, Esqrs., Special Attorneys;

Wendell Berge, Assistant Attorney General, of Counsel; Attorneys for Plaintiff.

Appearances for respective moving defendants same as on motion to dismiss.

Opinion—December 26, 1944

Cone, D. J.:

This is a motion by a number of the defendants to dismiss the complaint for lack of jurisdiction over the subject matter of the action.

The action is for injunctive relief for alleged violation of Section 1 of the Sherman Act in the sale of alkalis in interstate and foreign trade and commerce.

The defendants are: (1) two incorporated export trade associations, (2) thirteen domestic corporations, all pro-
[fol. 76] ducers of alkalis in this country and members of

one or the other of the defendant associations, and (3) a British corporation, which is the dominant producer of alkalis in Great Britain, together with its New York subsidiary. The two defendant associations have filed with the Federal Trade Commission the papers required by the Webb-Pomerene Act (Act of April 10, 1918, c. 50, 40 Stat. 516).

The sole ground of the motion is that under sections 2 and 5 of the Webb-Pomerene Act "exclusive jurisdiction is vested in the first instance in the Federal Trade Commission of the matters complained of in the complaint * * *."

The complaint charges that the defendants and four other corporations, not named as defendants but named as co-conspirators, have engaged in a combination and conspiracy to restrain interstate and foreign commerce in alkalis in violation of Section 1 of the Sherman Act. Two of the named co-conspirators are a Belgian corporation, alleged to be "the principal manufacturer of alkalis on the continent of Europe", and a German corporation, alleged to be "the most important manufacturer of alkalis in Germany". The terms of various contracts, agreements and understandings are described in considerable detail, and it is alleged that under these contracts, agreements and understandings, foreign markets in alkalis were divided and allocated, export quotas were established, foreign prices were regulated and controlled, and competition in United States markets from foreign producers was eliminated. It is also alleged that concerted action was taken to stifle competi- [fol. 77] tion in United States export trade from independent domestic manufacturers. The effects of the alleged conspiracy are stated to have been to restrain trade within the United States, to restrain the export trade of domestic competitors of the defendants, artificially and intentionally to enhance and stabilize the prices of alkalis within the United States, and substantially to lessen competition within the United States.

The Webb-Pomerene Act was enacted in 1918 to legalize associations formed for the sole purpose of engaging in export trade. Section 2 exempts from the operation of the Sherman Act "an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade". It also exempts "an agreement made or acts done in the course of export trade by such association." The proviso clauses of the section, how-

ever, considerably narrow the exemption so that it affords no immunity (1) when the association, agreement or act is in restraint of trade within the United States, or is in restraint of the export trade of any domestic competitor of the association, or (2) when the association enters into any agreement, understanding or conspiracy, or does any act which artificially or intentionally enhances or depresses prices within the United States, or which substantially lessens competition within the United States or otherwise restrains trade therein.

[fol. 78] Section 5 of the Act is concerned with procedure, and contains two paragraphs. The first paragraph requires export associations to file with the Federal Trade Commission verified written statements containing specified information regarding their organization and activities. The second paragraph provides a special procedure under which the Commission is authorized to conduct an investigation when it has reason to believe (1) that an association, or any agreement made or act done by it, is in restraint of trade within the United States, or in restraint of the export trade of any domestic competitor of the association, or (2) that an association has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States, or which substantially lessens competition within the United States or otherwise restrains trade therein. If, after investigation, the Commission concludes that the law has been violated, it may make recommendations to the association for the readjustment of its business. If the recommendations are not followed, the Commission is to refer its findings and recommendations to the Attorney-General for such action as he may deem proper.

Clearly, Section 2 of the Webb-Pomerene Act granted no immunity to the moving defendants for such a con-[fol. 79] spiracy as charged in the complaint. And the allegations of the complaint are to be accepted as true for the purposes of the motion. But it is said that Section 5 provides a special procedure which prevents the court from taking jurisdiction of the action until after the Federal Trade Commission has conducted an investigation and referred its findings and recommendations to the Attorney General. This same argument was considered by the Supreme Court in *United States v. Borden Co.*, 308 U. S. 188, 203-206, with respect to the Capper-Volstead Act (42 Stat.

388, 7 U. S. C. A. §§ 291, 292), and it was held that the special procedure of that Act was merely an "auxiliary" procedure, and not in any way "a substitute for the provisions of the Sherman Act" (p. 206). This special procedure of the Capper-Volstead Act, with its provision for a hearing and judicial review, is far more comprehensive than that of the Webb-Pomerene Act, and the decision is controlling on the question presented by the motion. I hold, therefore, that the powers conferred on the Federal Trade Commission by Section 5 of the Webb-Pomerene Act are merely auxiliary, and do not in any way interfere with or prevent the maintenance of the present action.

The motion of the moving defendants to dismiss the complaint for lack of jurisdiction over the subject matter of the action is denied.

December 26, 1944.

(Sgd.) Alfred C. Coxe, U. S. D. J.

[fol. 80] In United States District Court, Southern District of New York

Civil No. 24-464

United States of America, Plaintiff,

against

United States Alkali Export Association, Inc., et al., Defendants

Order Denying Motion to Dismiss Complaint—Filed January 12, 1945

A motion having been made on April 26, 1944 by certain of the defendants to dismiss the complaint for lack of jurisdiction over the subject matter of the action, and an order, dated May 27, 1944, having been entered by Judge Alfred C. Coxe in effect making certain other defendants parties to said motion and extending their time to answer to and including the 30th day after the entry of an order on said motion to dismiss, and said motion having come on to be heard before Judge Coxe on May 12, 1944, and Judge Coxe

having rendered an opinion thereon on December 26, 1944, denying said motion, it is

Ordered:

(1) That the motion to dismiss the complaint for lack of jurisdiction over the subject of the action shall be and hereby is denied;

(2) That said defendant shall answer, plead or otherwise move with respect to the complaint within thirty (30) days after the entry of this order;

(3) That if within said thirty (30) days said defendants, or any of them, shall file with the Supreme Court of the United States a petition for writ of certiorari to review the [fol. 81] action of this Court in denying the aforesaid motion to dismiss, then the time provided for in (2) above shall be, and is hereby, extended to and including the 30th day after the Supreme Court of the United States acts upon said petition and, in the event that said petition is granted, said defendants may apply for a further extension of such time.

Dated: New York, New York, January 11, 1945.

Alfred C. Coxe, U. S. D. J.

[File endorsement omitted.]

[fol. 82] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83] Supreme Court of the United States, October Term, 1944

No. 1016

Order Allowing Certiorari—Filed March 5, 1945

The petition herein for a writ of certiorari to the District Court of the United States for the Southern District of New York is granted, and the case is consolidated with California Alkali Export Association et al. vs. The United States of America, No. 1017, for argument.

Counsel are requested to discuss in their briefs and upon oral argument the question whether the order of the District Court may appropriately be reviewed at the present stage

of the proceedings by a writ of certiorari under section 262 of the Judicial Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 84] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 1017

ORDER ALLOWING CERTIORARI—Filed March 5, 1945

The petition herein for a writ of certiorari to the District Court of the United States for the Southern District of New York is granted, and the case is consolidated with United States Alkali Export Association, Inc., et al. vs. The United States of America, No. 1016, for argument.

Counsel are requested to discuss in their briefs and upon oral argument the question whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by a writ of certiorari under section 262 of the Judicial Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 49,469, 49,470, D. C. U. S., Southern New York. Term No. 1016. United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., et al., Petitioners, vs. The United States of America. No. 1017. California Alkali Export Association, West End Chemical Co. (Inc.), Pacific Alkali Co., (Ltd.), Petitioners, vs. The United States of America. Petitions for writs of certiorari and exhibit thereto. Filed March 5, 1945. Term No. 1016 O. T. 1944, 1017 O. T. 1944.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 18 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ~~852~~ 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC.,
PITTSBURGH PLATE GLASS COMPANY (INC.),
CHURCH & DWIGHT CO., INC.,
DIAMOND ALKALI COMPANY (INC.),
DOW CHEMICAL COMPANY, INC.,
HOOKER ELECTROCHEMICAL COMPANY (INC.),
THE MATHIESON ALKALI WORKS, (INC.),
NIAGARA ALKALI CO.,
PENNSYLVANIA SALT MANUFACTURING CO.,
SOUTHERN ALKALI CORPORATION,
WESTVACO CHLORINE PRODUCTS CORPORATION, INC.
WYANDOTTE CHEMICALS CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Office - Supreme Court, U. S.
FILED
MAR 5 1945
CHARLES ELMORE CROPLEY
CLERK

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

LELAND HAZARD,
DAVID A. REED,
CALVIN A. CAMPBELL,
ROBERT T. MCCRACKEN,
E. C. LEWIS,
RALPH S. HARRIS,
WILLIAM E. SIMS,

H. G. HITCHCOCK,
H. W. STULL,
J. E. F. WOOD,
F. C. LOWTHORP,
BRUCE BROMLEY,
GEORGE S. COLLINS,
JOHN LOGAN O'DONNELL,
Of Counsel.

January 17, 1945.

INDEX

	PAGE
Petition for Writ of Certiorari	1
Statement	2
The Webb-Pomerene Act	4
Jurisdiction to Review	7
Questions Presented	8
Reasons Relied on for Allowance of the Writ	8
Brief in Support of the Petition	11
Opinion Below	11
Argument	11
POINT I. Public policy would be served by a prompt determination of the fundamental issue here presented	11
POINT II. The issue is one of public importance as between the jurisdiction of the courts and the jurisdiction of a commission "appointed by law and informed by experience"	12
(A) The language of the Act is particularly strong in entrusting primary jurisdiction to the Commission and deferring the function of the Attorney-General	13
(B) Decided cases under other statutes leave the issue open to what extent the "primary jurisdiction" doctrine shall apply under each	14
(C) This case also brings forward for serious consideration the application of the doctrine requiring exhaustion of administrative remedies before resort to the courts	17
(D) The question is of particular moment where foreign trade is concerned	18

PAGE

(E) The circumstances of the time of the enactment of the Webb-Pomerene Act and the debates in Congress are at least strongly indicative of an intent of Congress to entrust exclusive primary jurisdiction to the Commission 20

(F) There is a real risk of unseemly conflict between the decree of a court of equity and the order of the commission 24

Appendix A 26

Appendix B 28

Outline of the Complaint 28

(1) Alleged international cartel agreements 29

(2) Alleged restraints upon exports by domestic competitors 30

(3) Alleged "Stabilization of Domestic Prices" .. 31

TABLE OF CASES

Apex Hosiery Co. v. *Leader*, 310 U. S. 469 14

Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427, 434 18

Board of Trustees v. *United States*, 289 U. S. 48, 57 18

Brolan v. *United States*, 236 U. S. 216, 218, 222 18

Buttfield v. *Stranahan*, 192 U. S. 470, 492 18

Dayton-Goose Creek Railway Company v. *United States*, 263 U. S. 456, 478 14

Endicott Johnston Corp. v. *Perkins*, 317 U. S. 501 17

Gray v. *Powell*, 314 U. S. 402 17

Holiday v. *Johnson*, 313 U. S. 342, 348, n. 2 7

PAGE

In re Chetwood, 165 U. S. 443, 462 7
In re 620 Church Street Corp., 299 U. S. 24, 26 7
McClellan v. *Carland*, 217 U. S. 268 8
McLean Trucking Co. v. *United States*, 321 U. S. 67 17
Myers v. *Bethlehem Corp.*, 303 U. S. 41 17
National Broadcasting Co. v. *United States*, 319 U. S. 190 17
Perkins v. *Lukens Steel Co.*, 310 U. S. 113 17
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117 8
The Abby Dodge, 223 U. S. 166, 176, 177 18
Union Pacific R. R. Co. v. *Weld County*, 247 U. S. 282 8
United States v. *Borden Company*, 308 U. S. 188 14
United States v. *Pacific & Arctic Company*, 228 U. S. 87 ..... 15, 16
United States v. *South-Eastern Underwriters Association*, 322 U. S. 533 19
Weber v. *Freed*, 239 U. S. 325, 329, 330 18

STATUTES AND MISCELLANEOUS

Act of March 3, 1911, ch. 231, § 291 (36 Stat. 1167; 15 U. S. C. § 29, 49 U. S. C. § 45) 7
Bureau of Foreign and Domestic Commerce (Pamphlet issued November, 1935, p. 1) 23
Clayton Act § 7 (38 Stat. 731, 15 U. S. C. § 18) 6, 7
Cong. Record, Vol. 54, Part 1, pp. 31, 32 21
Cong. Record, Vol. 55, Part 4, p. 3570 22
Cong. Record, Vol. 55, Part 7, p. 7326 23

PAGE

Judicial Code, § 262 (36 Stat. 1162, 28 U. S. C. § 377) 7
Preliminary Report of the Federal Trade Commission (May, 1916, p. 9) 21
Robinson-Patman Act (49 Stat. 1526, 15 U. S. C. § 13(a)) 6
Rule 38 of Rules of this Court 2
Sen. Report No. 1056, 64th Cong., 2nd Sess., pp. 3-4 22
Sherman Anti-Trust Act (26 Stat. 209, 15 U. S. C. §§ 1, 2, 4) 2, 8
Webb-Pomerene Export Trade Act, §§ 2, 5 (40 Stat. 517, 15 U. S. C. §§ 62, 65) 2, 4-7, 13, 25, 26
49 U. S. C. A. § 12, p. 370n 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.

UNITED STATES ALKALI EXPORT ASSOCIATION, INC.,
PITTSBURGH PLATE GLASS COMPANY (INC.),
CHURCH & DWIGHT CO., INC.
DIAMOND ALKALI COMPANY (INC.),
DOW CHEMICAL COMPANY, INC.,
HOOKER ELECTROCHEMICAL COMPANY (INC.),
THE MATHIESON ALKALI WORKS, (INC.),
NIAGARA ALKALI CO.,
PENNSYLVANIA SALT MANUFACTURING CO.,
SOUTHERN ALKALI CORPORATION,
WESTVACO CHLORINE PRODUCTS CORPORATION, INC.
WYANDOTTE CHEMICALS CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes Wm. Dwight Whitney, counsel for the Petitioners above-named and respectfully moves this Court for leave to file the petition for writ of certiorari, hereto annexed, under Section 262 of the Judicial Code (28 U. S. C. sec. 377), directed to the District Court of the United States for the Southern District of New York, to review an order of that Court, entered January 12, 1945, more particularly described in the petition, and for such other and further relief as may be just and proper.

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

January 25, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., PITTSBURGH PLATE GLASS COMPANY (INC.), CHURCH & DWIGHT CO., INC., DIAMOND ALKALI COMPANY (INC.), DOW CHEMICAL COMPANY, INC., HOOKER ELECTROCHEMICAL COMPANY (INC.), THE MATHIESON ALKALI WORKS, (INC.), NIAGARA ALKALI CO., PENNSYLVANIA SALT MANUFACTURING CO., SOUTHERN ALKALI CORPORATION, WESTVACO CHLORINE PRODUCTS CORPORATION, INC., WYANDOTTE CHEMICALS CORPORATION, *Petitioners,* *vs.* UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., Diamond Alkali Company (Inc.), Dow Chemical Company, Inc., Hooker Electrochemical Company (Inc.), The Mathieson Alkali Works (Inc.), Niagara Alkali Co., Pennsylvania Salt Manufacturing Co., Southern Alkali Corporation, Westvaco Chlorine Products Cor-

poration, Inc., and Wyandotte Chemicals Corporation, respectfully pray for a writ of certiorari to the District Court of the United States for the Southern District of New York, to review an order of that Court entered January 12, 1945, denying petitioners' motion to dismiss the respondent's complaint herein for lack of subject matter jurisdiction. A certified transcript of the record in this case is furnished herewith in accordance with Rule 38, par. 1, of the Rules of this Court.

STATEMENT

This case presents a question of jurisdiction under the Webb-Pomerene and Sherman Acts. It is a case of first impression. The precise question is whether a United States District Court exceeds its jurisdiction in entertaining a suit in equity initiated by the Attorney-General under the Sherman Anti-Trust Act[1] against an Export Trade Association formed under the Webb-Pomerene Export Trade Act[2], which suit involves only acts done by, or in alleged combination or conspiracy with, such Association, in the absence of a showing under § 5 of the Webb-Pomerene Act that the matter had been referred to the Attorney-General by the Federal Trade Commission.

The petitioners' position is that the provision of the Webb-Pomerene Act (§ 2) by which Congress entrusted to the Federal Trade Commission supervision and control over acts of export trade associations is so specific and comprehensive in its terms as to confer upon the Commission

---

[1] Act of July 2, 1890, ch. 647, 26 Stat. 209, 15 U. S. C. §§1, 2 and 4.

[2] Act of April 10, 1918, ch. 50, §2, 40 Stat. 517, 15 U. S. C. §§62, 65.

exclusive jurisdiction in that field in the first instance, and to postpone any jurisdiction of the Attorney-General, and consequently of the District Court, until reference by the Federal Trade Commission to the Attorney-General.

The scheme of the Webb-Pomerene Act is that an immunity from the Sherman Act is provided to export associations formed under it, and to acts done by them; that there are then inserted *provisos,* four in number, phrased to preserve domestic trade from consequent restraint; that such *provisos* follow closely the phraseology of the Sherman Act; and that the policing of the whole is entrusted exclusively to the Federal Trade Commission, except that the Attorney-General may take action upon reference to him by the Commission.

The Attorney-General, in commencing this action (independently of reference by the Commission), was frank and forthright in advising the public that it was a case of first impression, and of a character which had not been undertaken by any of his predecessors during the quarter of a century since the enactment of the Webb-Pomerene Act in 1918.

The question is believed to be of unique public importance, in that it involves the regulation and control of the export trade of the United States, at a moment in our history when the future of that trade and the method of its regulation and supervision by the government is attracting universal attention.

The complaint is comprehensive in the sense that it presents the characteristic issues that would presumably typify any case in which the problem is whether the activities of a Webb-Pomerene export trade association have fallen outside the scope permitted by the Webb-Pomerene

Act, and within the *provisos* of that Act, which were carefully framed with a view to protecting the public policy represented by the other anti-trust laws.

No one of the acts of the other defendants is alleged to have been taken independently of the association, or outside of the scope of the agreements, combination and conspiracy to which the association is alleged to have been a party, and in which indeed it is alleged to have been the principal moving party. The general tenor of the whole pleading is that the head and center of the combination and conspiracy was in the Association itself and that it either directed, or at the very least was a participant in, every agreement and every act.[3] This makes it utterly impossible to disassociate any allegation of the complaint from the subject-matter which it would be appropriate for the Federal Trade Commission to undertake in carrying out its investigatory function under Section 5 of the Webb-Pomerene Act.

Petitioners' contention as to the Webb-Pomerene Act is *not* that it has repealed the expression of policy found in the Sherman Act, but that it has by §5 entrusted exclusively to the Federal Trade Commission the initial enforcement of that public policy (so far as concerns acts of export trade associations registered with that Commission under that Act).

THE WEBB-POMERENE ACT

(1) The Webb-Pomerene Act provides a special supervisory jurisdiction for the field of foreign commerce, to the

[3] A more detailed outline of the complaint is given in Appendix B to the brief.

extent that it might be occupied by export trade associations (registered with the Federal Trade Commission) and their agreements and acts.

(2) To the exception which the Webb-Pomerene Act thus generally carves out of the jurisdiction conferred by the Sherman Act, there are annexed *provisos*, four in number:

(i) That the association, agreement or act should not be in restraint of trade *within* the United States,

(restraint outside the United States being permitted by implication, and indeed being the very reason for the enactment);

(ii) That the association, agreement or act should not be in restraint of the export trade of any domestic competitor of such association;

(iii) That no act or agreement of the association should artificially or intentionally enhance or depress prices within the United States of the commodities of the class exported by such association,

(artificial and intentional enhancement or depression of prices outside of the United States being by necessary implication permitted);

(iv) That no act or agreement of the association should substantially lessen competition within the United States or otherwise restrain trade therein.

(i) and (iv) are the same in substance, and amount to a general proviso against restraint of trade within the United States. They follow either directly the language of the Sherman Act, or indirectly the gloss that has been put upon that statute by the decisions of this Court or by

the substantive provisions of the Clayton Act[4] and the Robinson-Patman Act.[5]

(ii) and (iii) are more specific provisos, both of which also flow naturally from the nature of the Webb-Pomerene Act. The purpose of the Act was to permit restraints of trade in foreign markets. Proviso (ii) forbids restraint of other Americans wishing to export, and proviso (iii) forbids artificial or intentional raising or depressing of prices within the United States.

The problem is as to what government agency or officer first administers the complex questions that arise out of this statute. That question is in our view answered by §5. In its first paragraph it spells out in detail the provisions for filing with the Federal Trade Commission of full data and information upon the export trade associations and their agreements and activities, and provides the penalties for their failure so to file. The definition of the subject-matters upon which information is to be filed is a wide one, requiring information

> "as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals."

The second paragraph of §5 follows in identical language the substantive §2 *and entrusts to the Federal Trade*

---

[4] The language of a characteristic section of the Clayton Act being "where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." (Act of October 15, 1914, ch. 323, §7, 38 Stat. 731, 15 U. S. C. §18. See also 15 U. S. C. §13, §13a, §14).

[5] 49 Stat. 1526, 15 U. S. C. §13(a).

Commission the entire complex question of delimitation between the general exemption provided by the statute and the four specific provisos. We print in parallel columns in Appendix A the language of the substantive section (§2) and of the second paragraph of the procedural section (§5), from which it will be seen that there is no question arising under the substantive section which is not by the procedural section entrusted to the jurisdiction of the Federal Trade Commission.

JURISDICTION TO REVIEW

The date of the order of the District Court for the Southern District of New York sought to be reviewed was January 12, 1945.

Jurisdiction of this Court is invoked under Judicial Code §262 (36 Stat. 1162, 28 U. S. C. §377).

This Court has exclusive appellate jurisdiction in equity suits by the Attorney-General under the Sherman Anti-Trust law. Act of March 3, 1911, ch. 231, §291 (36 Stat. 1167, 15 U. S. C. §29, 49 U. S. C. §45). Grant of the common law writ of certiorari, as authorized by §262 of the Judicial Code, *supra*, is sought in aid of such exclusive appellate jurisdiction.

The grant of the writ under these unusual circumstances is respectfully sought

(1) to correct a claimed excess of jurisdiction by the Court below; and

(2) in furtherance of justice in a question of public importance.

See *In re 620 Church Street Corp.*, 299 U. S. 24, 26; *Holiday* v. *Johnston*, 313 U. S. 342, 348, n. 2; *In re Chet-*

wood, 165 U. S. 443, 462; *McClellan* v. *Carland*, 217 U. S. 268; *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison T. & S. F. Ry. Co.*, 253 U. S. 117.

QUESTIONS PRESENTED

1. Whether a District Court has jurisdiction of a complaint under §4 of the Sherman Anti-Trust Act when the complaint shows upon its face that the claims relate exclusively to acts done by, or under the leadership of, an Export Trade Association registered with the Federal Trade Commission under the Webb-Pomerene Export Trade Act, and there is no allegation that the Federal Trade Commission has referred findings and recommendations to the Attorney-General under §5 of the Webb-Pomerene Act for such action thereon as he may deem proper.

2. Whether the District Court (at suit of the Attorney-General) or the Federal Trade Commission has been entrusted by §5 of the Webb-Pomerene Export Trade Act with responsibility in the first instance to make the findings, within a single continuous chain of events inaugurated and directed by an Export Trade Association registered under that Act, as to which of the activities constituting such chain of events fall within the protection of the Act and which fall within its exclusory *provisos*.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) Possible avoidance of a lengthy and burdensome trial,

(2) Which cannot clarify but may obscure the issue,

(3) Which is one exclusively of law, and

(4) Of a character most appropriate for determination at the threshold of litigation, viz. a question exclusively of jurisdiction, and

(5) Which while it remains unresolved will continue to lead, as it is now leading, to prolonged proceedings simultaneously in United States Courts and before the Federal Trade Commission,

(6) In a field (that of international trade) of which the public importance is permanent, and

(7) Of which the public importance is particularly outstanding at the present moment and will presumably continue to be so throughout the period that would otherwise be consumed in the trial, with the result that

(8) Postponement of the question must impair the plans of commercial men for a revival of post-war international trade through their continued uncertainty as to the fundamental law under which they may operate, and may likewise even

(9) Cast doubt upon Executive and possibly even Legislative decisions.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the District Court of the United States for the Southern District of New York, sitting in the Borough of Manhattan, City, County and State of New York, commanding said Court to certify and send up to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings in said

District Court had in this case, to the end that this case may be reviewed and determined by this Court; that the order of said District Court be reversed; that the complaint herein be dismissed; and that your petitioners be granted such other and further relief as may appear proper.

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

LELAND HAZARD,
DAVID A. REED,
CALVIN A. CAMPBELL,
ROBERT T. MCCRACKEN,
E. C. LEWIS,
RALPH S. HARRIS,
WILLIAM E. SIMS,

H. G. HITCHCOCK,
H. W. STULL,
J. E. F. WOOD,
F. C. LOWTHORP,
BRUCE BROMLEY,
GEORGE S. COLLINS,
JOHN LOGAN O'DONNELL,
Of Counsel.

January 17, 1945

BRIEF IN SUPPORT OF THE PETITION

OPINION BELOW

The opinion of the District Court (R. pp.) has not yet been officially reported.

ARGUMENT

POINT I

PUBLIC POLICY WOULD BE SERVED BY A PROMPT DETERMINATION OF THE FUNDAMENTAL ISSUE HERE PRESENTED.

As the question arises on a motion for judgment on the face of the complaint, before the filing of an answer, the material facts of the complaint must of course be *assumed* (for the purpose of the motion only) to be true as alleged.[6] The multiplicity and complexity of the items alleged to have constituted the means and methods of carrying out the allegedly unlawful agreement, combination and conspiracy, and of participation in them by the very numerous named defendants and "co-conspirators" (both domestic and foreign), necessarily foreshadow a long and expensive trial.[7]

---

[6] The Petitioners, however, deny all material allegations of the complaint.

[7] Common experience in anti-trust litigation indicates that if the trial must be had before the fundamental jurisdictional question can be resolved by this Court, the intervening time must be measured not in months but in years. A generation ago the *Standard Oil*, *Tobacco* and *Steel* cases taught that a period of five to ten years was not an excessive estimate for the duration of an important anti-trust case. That that experience has not changed, is indicated by many recent examples, of which we need

Yet the period which must thus be occupied in the conduct of the proceedings will be precisely the period during which there will be the greatest need for the nation's plans in the field of international commerce to be free from legal doubts of a jurisdictional character.

Both governmental and commercial leaders must be laying their plans for the post-war era during the very years that would be consumed in the trial of this case on the issues of fact.

POINT II

THE ISSUE IS ONE OF PUBLIC IMPORTANCE AS BETWEEN THE JURISDICTION OF THE COURTS AND THE JURISDICTION OF A COMMISSION "APPOINTED BY LAW AND INFORMED BY EXPERIENCE".

The question falls within the ambit of the problem which has been recurrent before this Court since the growth of Federal administrative commissions and boards,—as to the extent to which in given cases the Congress has entrusted *exclusive* primary jurisdiction to a particular administrative body.

Our position is that the Federal Trade Commission is vested with exclusive jurisdiction *in the first instance* of

---

only cite the *Aluminum* case in the same Southern District of New York; there the actual trial, although substantially uninterrupted, had entered its second year before the government rested. Special emphasis may also be attributed in this case to the inclusion as a defendant of an important company of a foreign allied nation (not among the moving petitioners), for whose benefit alone decent considerations of international courtesy, under prevailing conditions of international travel and communication, may indicate a special requirement of time for preparation.

the matters complained of in this case, and that the Attorney-General may take jurisdiction only after and in the event that the Federal Trade Commission refers the matter to him for action.

(A) The language of the Act is particularly strong in entrusting primary jurisdiction to the Commission and deferring the function of the Attorney-General.

The actual words of the Webb-Pomerene Act are unusual, in that

(a) the substantive provisions[8] open with a general rule of exemption from the anti-trust acts, and then by carefully phrased provisos (four in number) specifically articulate the areas of activity in which various substantive principles of the Sherman Act remain applicable as exceptions to the exemption; and then

(b) the relevant *procedural* section[9] follows and repeats word for word the language of the substantive section, including all of the provisos; but directs that in policing the provisos, it is the Federal Trade Commission that shall be entrusted with that duty, the Attorney-General only entering the picture under the following concluding sentence of such procedural section:

> "Upon investigation, if it [the Federal Trade Commission] shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance

[8] §2, 15 U. S. C. §62.
[9] §5, 15 U. S. C. §65.

with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

(B) Decided cases under other statutes leave the issue open to what extent the "primary jurisdiction" doctrine shall apply under each.

The question in each case is whether it falls within the class in which Congress has entrusted its particular subject-matter, at least in the first instance, to the fostering guardianship and control of a commission (*Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, 478).

We recognize that this Court has been astute to guard against any loose accumulation of implied exceptions to the Sherman Act (*United States* v. *Borden Company*, 308 U. S. 188), while at the same time confining the Sherman Act to its appropriate fields (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469).

The Court below was of opinion that this case was governed by the decision under the Capper-Volstead Act[10] and the Agricultural Marketing Act[11] in the *Borden* case, 308 U. S. at pp. 203-206.

We believe that the *Borden* case is properly distinguishable in that the delegation of authority to the Secretary of Agriculture under the Acts there under consideration was not of the same comprehensive character as the delegation to the Federal Trade Commission by the Webb-Pomerene

[10] 42 Stat. 388, 7 U. S. C. §§291, 292.
[11] 50 Stat. 246, 7 U. S. C. §608.

Export Trade Act. As to the Agricultural Marketing Act, the case was relatively plain, as that Act required as a condition that the Secretary of Agriculture be a party to the agreements in question; and he was not. The Capper-Volstead Act, although stronger, was nonetheless of limited scope; and the section in question did not, as does the Webb-Pomerene Act, "cover the entire field of the Sherman Act" (308 U. S. at p. 206).

The vital distinction which we will submit, in the event that our petition for a writ is granted, is that under the Capper-Volstead Act the Secretary of Agriculture is concerned only with the activities of the Association as such, whereas under the Webb-Pomerene Act the Federal Trade Commission is concerned (under the specific *provisos*) with the whole effect upon interstate and foreign commerce not merely of the Association itself, and not merely of its own acts, but of its agreements with other parties and the acts pursuant thereto.

In the *Borden* case the alleged conspiracy was not merely between the Association and its members and associates; it was alleged to embrace its distributors and retailers also, so that the whole channel of distribution was tainted, and the Association was used as a mere excuse in the effort to defeat jurisdiction.

There can surely be no doubt but that where a statute does definitely entrust to a Commission exclusive primary jurisdiction of a given subject-matter, the jurisdiction of the Attorney-General and the Courts is necessarily replaced. *United States* v. *Pacific & Arctic Company*, 228 U. S. 87, was an express holding to that effect in so far as the counts under the Interstate Commerce Act were involved. As the agency charged with the primary duty of administering

the Act, it was for the Interstate Commerce Commission to determine in the first instance whether or not the activities of the defendants were in violation thereof. 228 U. S. 107-108.

The provisions in question in the *Pacific & Arctic* case were the same as those in the present case. 49 U. S. C. A. §12; at p. 370 footnote. They provided that the Commission should execute and enforce the Act in the first instance, and only then

> "upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof; * * *".

This Court rejected the view that the criminal consideration should be paramount. The statute, it said,

> "is more regulatory and administrative than criminal."
>
> "And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal."

That the Court there upheld two other counts under the Sherman Act is of superficial significance only, for the Interstate Commerce Act did not purport to concern itself with the monopolistic activities of railroads. The terms of the Webb-Pomerene Act, on the other hand, embrace the

whole field of the Sherman Act and entrust that very field to the Commission—in cases in which one of its own Export Trade Associations is to be made a party and its activities are to be the subject of inquiry.

(C) This case also brings forward for serious consideration the application of the doctrine requiring exhaustion of administrative remedies before resort to the courts.

This Court has been astute to guard against an overhasty resort to litigation in cases in which it was the evident Congressional purpose that the issues should first be submitted to a regulatory commission appointed by law and informed by experience. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Gray* v. *Powell*, 314 U. S. 402; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

This case brings before this Court problems bearing upon both fundamental doctrines—the "primary jurisdiction" doctrine and the "exhaustion of remedies" doctrine. The first is directly involved. The second is involved by analogy, for the Court will not overlook that there may be a real evil in conflicts of jurisdiction between the Federal Courts dealing at the suit of the Attorney-General with the same subject-matter which is being simultaneously considered by a Commission. We do not say that there can never be such concurrent jurisdiction; *cf.* §7 of the Clayton Anti-Trust Act, *supra* note 4, where it is expressly provided. Whether it should be implied where not provided, is quite a different question.

If the Attorney-General had some sort of inherent jurisdiction to enforce the Anti-Trust Acts, it would have been unnecessary for the Congress to confer it upon him or upon the district courts in respect of the Clayton Act.

We appreciate that the Department of Justice will argue that its jurisdiction must be all-pervasive, and that the "exhaustion of administrative remedies" doctrine applies only against individual litigants, and not against the Attorney-General. We recognize that this will often be the case. But we suggest that there is no "universal" (or shall we say constitutional?) provision that automatically lifts the Attorney-General above acts of Congress. Surely it must be an independent cause for inquiry in each case as to whether Congress has in fact intended to provide that the sort of litigation which the Attorney-General is especially qualified to conduct shall be deferred until after there shall have been a preliminary investigation and fact-finding by its duly appointed Commission.

(D) The question is of particular moment where foreign trade is concerned.

That there is a very real and genuine distinction between problems exclusively of domestic trade among the several states, on the one hand, and problems which interrelate with foreign and international trade, on the other hand, has long been recognized by this Court. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434; *Board of Trustees* v. *United States*, 289 U. S. 48, 57; *The Abby Dodge*, 223 U. S. 166, 176, 177; *Brolan* v. *United States*, 236 U. S. 216, 218, 222; *Weber* v. *Freed*, 239 U. S. 325, 329, 330; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492;

It is certainly not inherently unreasonable to suppose that Congress might have intended the ordinary cumbersome procedure of administration of trade relations by benefit of injunction suits in Federal Equity Courts—a procedure first conceived in 1890—to give way to modern administrative procedural concepts, at least wherever acts or activities were involved in which a part was played by one of those Export Trade Associations whose creation Congress was specifically authorizing, and whose supervision Congress was specifically entrusting to the Federal Trade Commission.[12]

That even an established system of regulation in a narrower geographic area may be required to give way to a system of regulation provided by Congress for a wider geographic area, when the first is intermingled with the second, was strikingly evidenced by *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533. If an established system of local regulation may be required by a statute of merely general application to give way to a national system of regulation, *a fortiori* a national system of regulation may be required to give way to an international system.

And this case is stronger in other respects than the *South-Eastern Underwriters* case. There it was necessary to conclude that a form of commerce, long deemed to be essentially local in character, and to the needs of which local legislatures had been universally attentive, had been brought within the scope of interstate regulation by a different legislature (the national Congress). Here it is necessary only to conclude that Congress itself, in exer-

[12] As to the growing doubt of the superiority of Federal equity suits in many fields, compare the restrictions upon their use in such diverse fields as labor disputes and railroad reorganizations.

cising its own choice as between the requirements of interstate commerce and the requirements of foreign commerce, has directed that where the two are intermingled, a cause of action based upon restraints of interstate commerce alleged to have arisen incidentally out of conduct of foreign commerce shall await preliminary investigation by the regulatory body to which it has entrusted supervision over such foreign commerce.

In determining this Congressional intent, resort may further be had to the circumstances of the time and to the debates in Congress.

(E) The circumstances of the time of the enactment of the Webb-Pomerene Act and the debates in Congress are at least strongly indicative of an intent of Congress to entrust exclusive primary jurisdiction to the Commission.

(a) *As to the circumstances of the time when the Webb-Pomerene Act was adopted:* It is noteworthy that the country was then in a position strikingly similar to that in which it now finds itself,—in a most trying and dangerous period toward the end of a great World War, when although a powerful enemy had recently taken or was about to take the military initiative, there was a general confidence in the country that victory would not be too long delayed, and that therefore it was timely to settle the legal questions upon which must be founded the anticipated expansion of post-war international trade and commerce.

(b) *As to the expressions of the President and the debates in Congress:* Their phraseology is at least strongly indicative that Congress intended that it was in the Commission itself, and not in the Courts, that it should in the

first instance be determined whether an export trade association went outside the permissive area of the Act and entered the forbidden area of the Sherman Act:

(i) From President Wilson's Address to Congress in recommending the legislation that became the Webb-Pomerene Act (Cong. Rec., Vol. 54, Part 1, pp. 31, 32):

> "I shall not argue at length the desirability of giving a freer hand in the matter of combined and concerted effort to those who shall undertake *the essential enterprise of building up our export trade.* That enterprise will presently, will immediately assume, has indeed already assumed, a magnitude unprecedented in our experience. We have not the necessary instrumentalities for its prosecution; it is deemed to be doubtful whether they could be created upon an adequate scale under our present laws. *We should clear away all legal obstacles* and create a basis of undoubted law for it which will give freedom without permitting unregulated license. The thing must be done now, because the opportunity is here and may escape us if we hesitate or delay."[13]

(ii) From the preliminary report to Congress by the Federal Trade Commission entitled "Cooperation in American Export Trade." May 1916 (p. 9):

> "In order to make it difficult for export combinations even to attempt restraint of trade in the United States, the right to cooperate or combine should be limited to the export trade solely, *and administrative supervision should be provided to insure that such*

[13] Emphasis supplied in all quotations.

organizations are not used surreptitiously for restraining trade at home."

(iii) From the Senate Report No. 1056, 64th Cong., 2nd Sess., at pp. 3-4:

"Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, *so that they may determine* whether and to what extent the laws have been violated."

(iv) From the remarks of Mr. Graham of the Judiciary Committee of the House of Representatives (Cong. Rec. Vol. 55, Part 4, p. 3570):

"The bill is intended to enable half a dozen or more men engaged in the same line of business to organize an agency that will handle their product intended for export trade, to be used in that trade alone, and can not in any wise affect the question of prices in this country; and if it does and becomes an element in restraint of trade here or destructive to competition, the saving clauses of the bill will bring the corporation or association offending under the control of the Federal Commission, which can dictate the terms by which its business shall be perfected and made unobjectionable; and *in case of* failure of the corporation to observe those rules, then the offending association is turned over to the Attorney General."

(v) From Senator Pomerene (Cong. Rec., Vol. 55, Part 7, p. 7326):

> "* * * we have provided particularly that all the operations of these associations shall be subject to the jurisdiction and control of the Federal Trade Commission; and if in anywise they may be interfering with what may be regarded as fair competition, or if they may be violating the laws of the land —trust laws or others—then the Federal Trade Commission can investigate and make orders respecting the conduct of their business; *and if they fail to comply with these orders, then these matters may be certified over to the Department of Justice for such action as they may think proper.*"

In so far as apparent conflicts appear in the various Committee reports and Congressional debates, we therefore believe that they will show that the grounds upon which the conflicting views were reconciled were (1) that the provisos in §2 of the Act would suffice to keep the substantive provisions of the Sherman Act in full force and effect for the protection of domestic trade and American exporters, but (2) that the policy of enforcing such substantive provisions against Export Trade Associations would be in the hands of an administrative agency and that Court proceedings were only to be resorted to after that agency had sent the case over to the Attorney-General.

And there is modern interpretation to the same effect by an *independent* agency of the government (Pamphlet entitled "The Export Trade Act", issued in November 1935 by the Bureau of Foreign and Domestic Commerce of the Department of Commerce, referring at p. 1 to the provisos in the Webb-Pomerene Act):

> "Although there are restrictions in the Act which may seem burdensome, these were placed there to safeguard our traditional policy of open competition in industry.
>
> "If upon investigation by the Federal Trade Commission of an act of an export association it is deemed to be a violation of the law, the offender is not penalized but reminded of the fact and directed to amend its ways. *Only upon failure to comply* with the recommendations of the Commission will the matter be brought to the attention of and for action by the Attorney General."

And we understand from newspaper releases by the Federal Trade Commission that it is similarly interpreting its duties, for it has instituted proceedings in a number of fields to review the acts of the associations and their associated companies.

(F) There is a real risk of unseemly conflict between the decree of a court of equity and the order of the Commission.

The Commission's statutory authority, after investigation, is expressly to

> "make to such association recommendations for the readjustment of its business."

That such a recommendation may vary from, indeed may directly conflict with, the orders that a Federal District Judge may deem fit to include in his decree, appears obvious.

We ask this Court only to determine whether it may not have been true that this is a possible evil which in this case Congress was expressly seeking to avoid.

The final problem—to construe the statute—we petition for leave to submit to this Court.

Respectfully submitted,

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

LELAND HAZARD,
DAVID A. REED,
CALVIN A. CAMPBELL,
ROBERT T. MCCRACKEN,
E. C. LEWIS,
RALPH S. HARRIS,
WILLIAM E. SIMS,
H. G. HITCHCOCK,
H. W. STULL,
J. E. F. WOOD,
F. C. LOWTHORP,
BRUCE BROMLEY,
GEORGE S. COLLINS,
JOHN LOGAN O'DONNELL,
Of Counsel.

January 17, 1945.

APPENDIX A

§ 2

Nothing contained in sections 1-7, inclusive, or section 15 of this title shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association,

p r o v i d e d such association, agreement, or act is not in restraint of t r a d e within the United States,

and is not in restraint of the export trade of any domestic competitor of such association:

Provided, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association

§ 5

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States

or in restraint of the export trade of any domestic competitor of such association,

or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association,

or which substantially lessens competition within the United States or otherwise restrains trade therein.

(Apr. 10, 1918, ch. 50, §2, 40 Stat. 517).

or which substantially lessens competition within the United States or otherwise restrains trade therein,

it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

(Apr. 10, 1918, ch. 50, §5, 40 Stat. 517).

APPENDIX B

Outline of the Complaint.

The first four headings of the complaint (I. JURISDICTION AND VENUE, II. THE DEFENDANTS, III. THE CO-CONSPIRATORS, IV. NATURE OF THE TRADE AND COMMERCE INVOLVED AND BACKGROUND OF THE CONSPIRACY) are introductory merely and do not directly affect the question. They define and describe the nature and constituents of alkalis and the processes by which they are produced. And they name and identify the defendants, which are:

(1) The Alkali Export Association ("Alkasso").

(2) Eleven members of the Alkali Export Association.

(3) The California Association ("Calkex")—another Webb Act Association—and its two members.*

(4) Imperial Chemical Industries, Ltd. (ICI), which is the dominant chemical company in Great Britain, and its New York subsidiary of similar name.

They also name so-called "Co-Conspirators":

(1) American Potash & Chemical Corporation, substantially all of the capital stock of which has been seized by the Alien Property Custodian.

(2) Belgian Solvay and its New York subsidiary of similar name.

* The defendants referred to in (1), (2) and (3) were all moving defendants in the District Court.

(3) The German company, I. G. Farben.

Under V, "Violations of Law", it is alleged that

> "defendants Alkasso and ICI and those defendants who were members of Alkasso in 1924 * * * and the remaining defendants from the time of their respective admission as members * * *"

have been engaged in an unlawful combination and conspiracy. The theory is that the conspiracy consisted in joining the Association (Complaint par. 41). The acts then taken by the parties under the alleged leadership of the Association are then particularized. The particularized allegations of violations of law divide into three portions, with appropriate subject-headings appearing in the complaint itself:

(1) *Alleged international cartel agreements.*

Under the sub-paragraphs of paragraph 41, Alkasso, Calkex and "their respective members" are alleged to have agreed not to compete, and to accept assignment of marketing areas as their joint exclusive territory, and not to export to the territories assigned to the foreign companies, etc.

In par. 43 Alkasso and ICI are alleged to have agreed to refrain from exporting alkalies to the United States. Accordingly, says par. 44, Alkasso, "acting on behalf of itself and its members", entered into an agreement with ICI evidenced by a written memorandum attached to the complaint as Exhibit A. Allegations as to subsequent agreements by Alkasso with ICI throughout the years appear in pars. 44-52 and in the balance of the exhibits.

Finally, in par. 53, it is generally alleged that each of the member companies participated in the negotiation of

the agreements, accepted their benefits and obligations, and participated in carrying them out. They are followed by particularization of Alkasso as the party which

> "allocated to each of its member companies a certain percentage of the total exports of alkalies comprising the Alkasso quota."

This is followed by the allegation that Alkasso,

> "to assure compliance by its members with the several agreements which Alkasso had entered into with defendants ICI and co-conspirators Belgian Solvay and I. G. Farben",

maintained until 1940 its position as exclusive foreign sales outlet for its members.

(2) *Alleged restraints upon exports by domestic competitors.*

Alkasso is alleged to have sought, by causing its member companies to do certain alleged acts, to restrain the competition of domestic companies which would otherwise have been its competitors for export trade. To that end Alkasso is alleged, in pars. 55, 56 and 57, to have caused the organization of Calkex, and to have entered into an understanding with Calkex agreeing upon market quotas, etc. In par. 59, we are told that the means for checking up on developments abroad was through "the foreign agencies or representatives of Alkasso and ICI". So far as Alkasso's members were concerned, they acted under the direction of Alkasso, which "*required* its members to report to it the names of all independent exporters * * *". And Alkasso is then charged with having exchanged information with ICI.

In par. 60 comes the express allegation of concerted action to eliminate competition from independent manufacturers. "Alkasso and ICI have taken concerted action as part of the conspiracy herein alleged to eliminate competition from such independent manufacturers". And Alkasso "has offered to act as the agent to handle the exports of such independent manufacturers or to purchase all of their alkalis to be exported * * *". Thus is Alkasso charged with having acted (to quote the statute) "in restraint of the export trade of any domestic competitor of such association".

Par. 60 concludes that by the acts aforesaid "Alkasso has succeeded in gaining control of most of the export trade of such independent domestic manufacturers * * *".

Par. 61 purports to analyze "the principal obstacle" which Alkasso has encountered in this alleged wrongful undertaking. Such principal obstacle was presented by the sales by independent dealers or exporters who had purchased their supplies from its members or from independent manufacturers. Alkasso is alleged to have met the obstacle by causing its own officers, agents and representatives abroad to investigate and police the sales; by requiring its members to refrain from selling to such exporters; and by instructing its agents abroad to undersell such independent exporters and to disparage the quality of their products.

(3) *Alleged "Stabilization of Domestic Prices".*

These allegations relate principally to efforts to increase the price of caustic soda by taking an alleged excessive supply off the domestic market. The means are again "the agreements between Alkasso and ICI hereinabove set forth

and (by) their practices thereunder". Alkasso is charged with having systematically allocated quotas between its members, and when the members were entitled to receive increases in their quotas these were "given" to them by Alkasso. Reciprocally, reduced quotas were "accepted" by the defendant members, when Alkasso in its systematical allocation thought proper to reduce them.

Office - Supreme Court, U. S.
FEB 16 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC.,
PITTSBURGH PLATE GLASS COMPANY (INC.),
CHURCH & DWIGHT CO., INC.,
DIAMOND ALKALI COMPANY (INC.),
DOW CHEMICAL COMPANY, INC.,
HOOKER ELECTROCHEMICAL COMPANY (INC.),
THE MATHIESON ALKALI WORKS, (INC.),
NIAGARA ALKALI CO.,
PENNSYLVANIA SALT MANUFACTURING CO.,
SOUTHERN ALKALI CORPORATION,
WESTVACO CHLORINE PRODUCTS CORPORATION, INC.,
WYANDOTTE CHEMICALS CORPORATION, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Motion for Leave to File Petition for Writ of Certiorari to the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR PETITIONERS, UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL.

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

LELAND HAZARD,
DAVID A. REED,
CALVIN A. CAMPBELL,
ROBERT T. MCCRACKEN,
E. C. LEWIS,
RALPH S. HARRIS,
WILLIAM E. SIMS,
H. G. HITCHCOCK,
H. W. STELL,
J. E. F. WOOD,
F. C. LOWETHORP,
BRUCE BROMLEY,
GEORGE S. COLLINS,
JOHN LOGAN O'DONNELL,
Of Counsel.

February 16, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

UNITED STATES ALKALI EXPORT ASSOCIATION, INC.,
PITTSBURGH PLATE GLASS COMPANY (INC.),
CHURCH & DWIGHT CO., INC.,
DIAMOND ALKALI COMPANY (INC.),
DOW CHEMICAL COMPANY, INC.,
HOOKER ELECTROCHEMICAL COMPANY (INC.),
THE MATHIESON ALKALI WORKS, (INC.),
NIAGARA ALKALI CO.,
PENNSYLVANIA SALT MANUFACTURING CO.,
SOUTHERN ALKALI CORPORATION,
WESTVACO CHLORINE PRODUCTS CORPORATION, INC.,
WYANDOTTE CHEMICALS CORPORATION, *Petitioners.*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Motion for Leave to File Petition for Writ of Certiorari to the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR PETITIONERS, UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL.

I.

In the Government's argument it is first suggested that this Court might well be more slow in the issuance of writs under Section 262 of the Judicial Code (28 U. S. C. Sec. 377) to District Courts than it would be in the issuance of

such writs to Circuit Courts of Appeal. It is not suggested that there is a lack of power to issue such writs to District Courts.

On principle, there can be no distinction between the issuance of the writ in the two cases. Under the Expediting Act (15 U. S. C. Sec. 29), no appeal would lie to a Circuit Court of Appeals, and relief in the nature of appellate review must be sought, if at all, in this Court.

II.

The underlying purpose of the Expediting Act, as its name implies, was "to insure speedy disposition of suits in equity brought by the United States under the anti-trust acts", *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558. The principle ground upon which we submitted our motion was addressed to precisely this consideration of speed of disposition.

It is significant that the Government does not at any point dispute that the proceedings in this case in the Court below would necessarily be lengthy and the date of final appeal be long deferred.

III.

Of course, we fully recognize that our motion is not to be lightly granted. It must be an unusual case in which this Court exercises this unusual power of review.

But the Government agrees that the question presented "is a significant one", and is a question of jurisdiction of the Court below to entertain the case at all.

IV.

Two minor practical considerations mentioned in the Government's brief remain to be noticed.

First. That the case is the first of its character to arise in twenty-five years under the Act, would be significant only

if the Government were suggesting that the Attorney General does not intend to bring any further cases of similar character. On the contrary, it has been widely reported in the press within the last week that further suits of precisely the same character were imminent, and we do not understand that the Attorney General, having now become of opinion that there is jurisdiction, does not intend in the future to exercise it.

Second. The Government suggests that elements of the "significant" issues to be presented to this Court in this case would require determination (i) whether jurisdiction of the District Court is barred as to all of the subject matter of the complaint or only a part, and (ii) whether it is barred as against the export trade associations only or as against all the defendants.

This also seems to us a reason in favor of the exercise of the Court's power. These are just such issues as are to be anticipated in any Webb-Pomerene Act case.

V.

In conclusion, we point out that the Government appears to be in agreement with us that the question is a significant one and that the Court has power to review it in the manner requested. The Government's opposition is based not upon a showing that the enforcement of the law would be prejudiced by such review, but merely upon the Government's own view as to what this Court may consider to be a necessary precaution against profligate applications for similar relief in other cases.

Our submission is that in a case of significant importance, presenting a novel and fundamental question of jurisdiction as between the Courts and a Federal Commission, this Court will find an apt occasion in the general interest to exercise a power which the Government itself admits has been often exercised in cases of lesser importance, and that the Court will not be deterred from performing

its function in a deserving case because of concern lest there may result an increase in the number of applications in undeserving cases.

Respectfully submitted,

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

LELAND HAZARD,
DAVID A. REED,
CALVIN A. CAMPBELL,
ROBERT T. MCCRACKEN,
E. C. LEWIS,
RALPH S. HARRIS,
WILLIAM E. SIMS,
H. G. HITCHCOCK,
H. W. STULL,
J. E. F. WOOD,
F. C. LOWTHORP,
BRUCE BROMLEY,
GEORGE S. COLLINS,
JOHN LOGAN O'DONNELL,
Of Counsel.

February 16, 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 5 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION,
WEST END CHEMICAL CO., (INC.),
PACIFIC ALKALI CO., (LTD.),

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRED. N. OLIVER,
Attorney for Petitioners,
110 East 42nd Street,
New York 17, N. Y.

C. W. HOBSON,
EDWARD D. LYMAN,
JOHN L. REITH,
WILLARD P. SCOTT,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Statement	2
Jurisdiction to Review	5
Opinion Below	5
Questions Presented	5
Reasons Relied on for the Allowance of the Writ	6
1. A Prompt Determination of the Issue Presented Is Required in the Public Interest	6
2. This Case Presents an Important Question of Federal Law That Has Not Been, But Should Be, Determined by This Court	7
Decisions Under Other Statutes	9
The Legislative History of the Act	12
3. This Case Presents a Question of General Public Importance Concerning the Respective Jurisdictions of Commission and Court	16
Appendix	i
Webb-Pomerene Export Trade Act	i

Table of Cases.

Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, Rock Island & Pacific R. Co., 294 U. S. 648, 685 (1935)	6
Endicott Johnson Corp. v. Perkins, 317 U. S. 501, 509 (1943)	16
Gray v. Powell, 314 U. S. 402, 412 (1941)	16, 17
Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U. S. 523, 539, 568 (1943)	16
Holiday v. Johnston, 313 U. S. 342, n. 2 (1941)	5

	PAGE
In re Chetwood, 165 U. S. 443, 462 (1897)	5
In re 620 Church Street Corp., 299 U. S. 24, 26 (1936)	5
Lockerty v. Phillips, 319 U. S. 182 (1943)	17
McClellan v. Carland, 217 U. S. 268 (1910)	5
Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51 (1938)	17
Rochester Telephone Corp. v. United States, 307 U. S. 125, 139 (1939)	17
Spiller v. Atchison T. & S. F. Ry. Co., 253 U. S. 117 (1920)	5
Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 50 (1910)	12
Union Pacific R. R. Co. v. Weld County, 247 U. S. 282 (1918)	5
United States v. Borden Co., 308 U. S. 188 (1939)	9, 10, 11, 18
United States v. Pacific & Arctic R. & N. Co., 288 U. S. 87 (1913)	11, 12
United States Navigation Co. v. Cunard S. S. Co., 284 U. S. 474, 485 (1931)	16
United States v. Morgan, 307 U. S. 183, 191 (1938)	17

Statutes and Authorities Cited.

Webb-Pomerene Export Trade Act of April 10, 1918, c. 50, 40 Stat. 517, U. S. C. A. §§ 61-65	2
Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. §§ 1-7, 15	2
Section 262 of the Judicial Code [36 Stat. 1162, 28 U. S. C. A. § 377]	5
Acts of Feb. 11, 1903 (Stat. 823), and March 3, 1911 (36 Stat. 1167), 15 U. S. C. A. § 29	5
Agricultural Marketing Agreement Act of June 3, 1937, ch. 296, 50 Stat. 246, 7 U. S. C. A. § 608b *et seq.*	9
Capper-Volstead Act of February 18, 1922, ch. 57, 42 Stat. 388, 7 U. S. C. A. §§ 291, 292	9

PAGE

Senate Report No. 1056, 64 Cong. 2nd Sess. at pp. 3-4 (on H. R. 17350) 12
Cong. Rec. Vol. 55, Part 3, p. 2788 13
Cong. Rec. Vol. 55, Part 7, p. 7326 14
Cong. Rec. Vol. 56, Part 1, p. 111 14
Cong. Rec. Vol. 56, Part 1, p. 119 15
Bureau of Foreign and Domestic Commerce (Pamphlet issued November, 1935, p. 1) 15
Cong. Rec. Vol. 55, Part 1, pp. 31, 32 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CALIFORNIA ALKALI EXPORT ASSOCIATION,
WEST END CHEMICAL CO., (INC.),
PACIFIC ALKALI CO., (LTD.),

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Now come your petitioners, California Alkali Export Association, West End Chemical Co., (Inc.), and Pacific Alkali Co., (Ltd.), by their attorney, and respectfully pray that they be granted leave to file their petition, submitted herewith, for a writ of certiorari to the District Court of the United States for the Southern District of New York.

FRED N. OLIVER,
Attorney for Petitioners,
110 East 42nd Street,
New York 17, New York.

C. W. HOBSON,
EDWARD D. LYMAN,
JOHN L. REITH,
WILLARD P. SCOTT,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1944

No.

CALIFORNIA ALKALI EXPORT ASSOCIATION,
WEST END CHEMICAL CO., (INC.),
PACIFIC ALKALI CO., (LTD.),

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, California Alkali Export Association, West End Chemical Co. (Inc.), and Pacific Alkali Co. (Ltd.), respectfully pray for a writ of certiorari to the District Court of the United States for the Southern District of New York to review an order entered January 12, 1945, by said Court, denying a motion to dismiss the respondent's complaint herein for lack of jurisdiction over the subject matter.[1]

[1] Petitioners herein were not original parties to the motion to dismiss, but by stipulation and order of the District Court were treated as having joined in said motion.

Statement

This is a case of first impression, presenting an issue of jurisdiction under the Webb-Pomerene and Sherman Acts that has not heretofore been passed upon by the courts.

Petitioners are an export trade association, formed under the Webb-Pomerene Export Trade Act,[2] and its members. They are defendants, together with another such association and its members, in a suit in equity in the District Court brought by the Attorney General for an injunction against alleged violations of Section 1 of the Sherman Anti-Trust Act,[3] involving acts done by, or in alleged combination or conspiracy with, such associations. A motion was made to dismiss the complaint on the ground that it contained no allegation that the matter had been referred to the Attorney General by the Federal Trade Commission under Section 5 of the Webb-Pomerene Act and that consequently the District Court was without jurisdiction. This motion was denied by the District Court.

The ruling of the court below presents a question of general importance as to whether a United States District Court exceeds its jurisdiction in entertaining a suit in equity by the Attorney General under the Sherman Act against export trade associations (and their members) formed and operating under the Webb-Pomerene Act, prior to a reference of the matter by the Federal Trade Commission to the Attorney General under Section 5 of the Webb-Pomerene Act for such action thereon as he may deem proper.

The allegations of the complaint are in substance and effect that all of the activities complained of were part of,

---

[2] Act of April 10, 1918, c. 50, 40 Stat. 516, 15 U. S. C. A. §§ 61-65.

[3] Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. §§ 1-7, 15.

and intertwined with, the activities of an export trade association. No act separate and apart from the activities of an export trade association, or outside of the scope of the agreements, combinations and conspiracy to which an association is alleged to have been a party, is pointed to as a violation of law. The entire purport of the pleading is that the alleged acts and conspiracies grew out of and were done or entered into pursuant to the leadership, or with the active participation, of an export trade association.

The all-pervasive participation of an export trade association in each of the matters set forth in the complaint would render it impossible to distinguish and separate any of them from the matters over which the Federal Trade Commission is given power under the Webb-Pomerene Act.

The question is one exclusively of jurisdiction. Petitioners contend that under Sections 2 and 5 of the Webb-Pomerene Act, exclusive primary jurisdiction is conferred upon the Federal Trade Commission with respect to acts of export trade associations registered with the Commission under that Act. They do not contend that the Webb-Pomerene Act repealed the Sherman Act, but only that the duty of the Attorney General to enforce the latter Act and the jurisdiction of the District Court to entertain a proceeding thereunder have been deferred, as to the actions of an export trade association, until the primary jurisdiction of the Commission has been exercised.

Section 2 of the Webb-Pomerene Act provides, for associations registered thereunder with the Commission and for agreements made and acts done in the course of export trade by such associations, a comprehensive exemption from the Sherman Act, subject to four exceptions:

(1) such association, agreement or act is not in restraint of trade within the United States;

(ii) such association, agreement or act is not in restraint of the export trade of any domestic competitor of such association;

(iii) such association does not enter into any agreement, understanding or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association; and

(iv) such association does not enter into any agreement, understanding or conspiracy or do any act which substantially lessens competition within the United States or otherwise restrains trade therein.

Section 5 of the Act lodges in the Federal Trade Commission special supervisory jurisdiction over such associations engaged in foreign commerce. Specified reports must be filed with the Commission, together with such other information relating to the association's organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals, as the Commission may require. Penalties are provided for failure to comply.

The second paragraph of Section 5 empowers and directs the Commission to investigate and determine whether, in any instance, the limits of the exemption provided by Section 2, as defined by the four exceptions, have been exceeded. The authority so granted is in terms identical with the provisions of Section 2 and consequently covers the entire scope of that section.

The same paragraph provides that if the Commission shall conclude that the law has been violated, it may make recommendations to the association and if such recommendations are not complied with, the Commission shall

refer the matter to the Attorney General for such action as he may deem proper.

It is the position of petitioners that, until such a reference has been made by the Commission, the District Court is without jurisdiction to entertain an action by the Attorney General.

Jurisdiction to Review

The jurisdiction of this Court is invoked under Section 262 of the Judicial Code [36 Stat. 1162, 28 U. S. C. A. § 377], by reason of this Court's exclusive appellate jurisdiction in equity suits by the Attorney General under the Sherman Anti-Trust Act and in aid of such exclusive appellate jurisdiction [Acts of Feb. 11, 1903 (32 Stat. 823) and Mar. 3, 1911 (36 Stat. 1167), 15 U. S. C. A. § 29].

The grant of the writ is respectfully sought to correct a claimed excess of jurisdiction by the court below and in furtherance of the determination of a question of great public importance.

See *In re Chetwood*, 165 U. S. 443, 462 (1897); *McClellan* v. *Carland*, 217 U. S. 268 (1910); *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282 (1918); *Spiller* v. *Atchison T. & S. F. Ry. Co.*, 253 U. S. 117 (1920); *In re 620 Church Street Corp.*, 299 U. S. 24, 26 (1936); *Holiday* v. *Johnston*, 313 U. S. 342, n. 2 (1941).

Opinion Below

The opinion of the District Court, (R. [illegible]) has not been reported.

Questions Presented

1. Whether a District Court has jurisdiction to entertain an equity proceeding under the Sherman Anti-Trust Act relating solely to acts done by, or under the leadership

of an export trade association registered with the Federal Trade Commission under the Webb-Pomerene Export Trade Act, prior to a reference, pursuant to Section 5 of that Act, by the Federal Trade Commission of its findings and recommendations to the Attorney General for action thereon.

2. Whether the Federal Trade Commission has been entrusted by Section 5 of the Webb-Pomerene Export Trade Act with exclusive primary jurisdiction to make the findings, within a single continuous chain of events inaugurated and directed by an export trade association registered with the Commission, as to which of the activities constituting such chain of events come within the exemptions granted by the Act and which fall within its exceptions.

Reasons Relied on for the Allowance of the Writ

1. A Prompt Determination of the Issue Presented Is Required in the Public Interest.

Until this Court has determined the issue here presented, the resulting uncertainty as to its ultimate conclusion will have effects upon industry and foreign trade of great importance to the public.

The protracted and time-consuming character of anti-trust litigation, like that of railroad receiverships prior to amendment of the Bankruptcy Laws,[4] is a matter of common knowledge. Were a final determination of this issue deferred pending a conclusion of the proceedings in the District Court, it may reasonably be assumed that the lapse of time would be comparable to that in other anti-trust cases. The consequences are both evident and significant.

[4] *Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 685 (1935).

During a period of the most intensified production of war materials, the individual petitioners' efforts would be diverted by the complexities of a litigation involving many phases of their organization and functions, all of which may be wholly unnecessary and useless if they are ultimately sustained on the issue presented. This consequence may not be restricted, however, to this one segment of industry. In reliance upon the decision below, it is not unreasonable to assume that similar proceedings may be instituted with respect to other fields of industry and production, with resulting cumulative effects. The public interest in the avoidance of every unnecessary dissipation of productive effort at this critical period points to the need of a determination by this Court that will obviate such a risk.

Nor are the consequences of delay confined solely to present public needs. The purposes of the Webb-Pomerene Act, namely to foster and encourage the development of foreign trade, are of particular significance with reference to the post-war period. The generally anticipated expansion of foreign trade upon the termination of the war is a matter of national interest and of preparation and planning on a national and international basis. Pertinent policies and plans cannot be developed overnight. If export trade associations are to fulfill the purposes for which Congress authorized their creation, the public interest will be promoted by the elimination of legal uncertainties, the existence of which may not only require a diversion of effort of those so engaged, but also retard and mitigate against the successful inception of programs of international commerce and trade.

2. This Case Presents an Important Question of Federal Law That Has Not Been, But Should Be, Determined by This Court.

Section 2 of the Webb-Pomerene Act contains a general exemption from the provisions of the Sherman Act, subject

to the four exceptions that are set forth in its two provisos. Section 5 of the Act sets forth the procedural provisions for its enforcement and policing. After requiring the filing of specified data with the Federal Trade Commission, together with such other information as the Commission may require, the second paragraph of Section 5 directs the Commission to conduct an investigation into alleged violations of the law whenever it shall have reason to believe that such a violation shall have occurred. The acts and circumstances constituting violations are set forth in the paragraph, in terms identical with the exceptions contained in the provisos of Section 2.

The jurisdiction of the Commission does not end with the investigation. If it concludes that the law has been violated, it may make to the association recommendations for the readjustment of its business to the end that the association may thereafter maintain its organization and management and conduct its business in accordance with law. The final sentence of the paragraph sets the limits of the Commission's jurisdiction and prescribes the time at which the duties of the Attorney General and the jurisdiction of the courts commence:

> "If such association fails to comply with the recommendations of the Federal Trade Commission, said Commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

The statutory direction seems clear that only upon noncompliance with the Commission's recommendation does its jurisdiction cease, and only then does the procedure elsewhere prescribed for enforcement of the Sherman Act come into play.

The court below held that the powers so conferred on the Commission by this Section 5 are merely auxiliary and

do not prevent the maintenance of an action by the Attorney General prior to final action by the Commission pursuant to the powers granted it. This presents an important question of federal law that has not been, but because of its grave consequences should be, determined by this Court.

Decisions Under Other Statutes

The District Court concluded that the decision of this Court in *United States* v. *Borden Co.*,[5] which construed the Agricultural Marketing Agreement Act[6] and the Capper-Volstead Act,[7] is controlling. It is submitted that that decision is not determinative of the issue here presented, because of the vital distinctions between the statutes involved.

As to the portion of the decision in the *Borden* case dealing with the Agricultural Marketing Agreement Act, upon which the District Court below did not purport to rely, the decision of this Court plainly rested upon the ground that there had not been a compliance with the statutory condition that the Secretary of Agriculture approve or enter into the agreement or make an order or award with respect thereto.[8]

As to the portion of the opinion dealing with the Capper-Volstead Act, the following distinctions are significant:

(i) This Court pointed out that the Capper-Volstead Act provided only a "limited procedure" that did not cover the entire field of the Sherman Act.[9] The Webb-Pomerene Act, however, empowers the Commission to act, as to a foreign trade association, with respect to all matters that

[5] 308 U. S. 188 (1939).

[6] Act of June 3, 1937, ch. 296, 50 Stat. 246, 7 U. S. C. A. § 608 b *et seq.*

[7] Act of February 18, 1922, ch. 57, 42 Stat. 388, 7 U. S. C. A. §§ 291, 292.

[8] 308 U. S. 188 at 199-201.

[9] 308 U. S. 188 at 206.

are embraced by the Sherman Act, by reason of the all-inclusive matters specified in the second paragraph of Section 5.

(ii) The Capper-Volstead Act made no provision for enforcement by the Attorney General of the provisions of the Sherman Act in the event of non-compliance with the orders of the Secretary of Agriculture, but only for the enforcement of the Secretary's orders, leaving, as this Court observed, only a civil proceeding available. On the other hand, the Webb-Pomerene Act specifically provides a procedure for the enforcement of the Sherman Act and the application of its sanctions upon non-compliance with the Commission's recommendation.

(iii) The Capper-Volstead Act, as construed by the District Court in the *Borden* case, provided in substance a *substitute* remedy that was not as complete as that afforded by the Sherman Act, whereas the Webb-Pomerene Act contemplates not a substitute remedy but merely an initial procedure that gives the Commission primary jurisdiction until such time as its powers prove ineffective. Thereafter, but not prior to that time, the procedure generally applicable under the Sherman Act becomes available.

(iv) Under the Capper-Volstead Act the Secretary of Agriculture was concerned only with the activities of the association as such, while under the Webb-Pomerene Act the Commission is concerned with the whole effect upon interstate and foreign commerce not only of the association itself and its acts, but also of its agreements with others and acts pursuant thereto.

Viewed in the light of the relatively restricted character of the subject matter entrusted to the Secretary of Agriculture under the Capper-Volstead Act, as contrasted with the broad scope of power granted the Federal Trade Com-

mission under the Webb-Pomerene Act, we believe that these distinctions support the conclusion that the *Borden* case is not controlling of the issue here presented.

No other decision of this Court is referred to by the District Court as supporting its conclusion and only one other was referred to by the Government in its memorandum in opposition to the motion below, *United States* v. *Pacific & Arctic R. & N. Co.*[10] The decision in that case involved two distinct questions. As to the counts of the indictment charging a violation of the anti-trust laws, it was held that the District Court improperly sustained demurrers, inasmuch as infringement of the anti-trust law was charged. The opinion states that it was unimportant to consider the power of the Interstate Commerce Commission, which is a natural conclusion in view of the absence of jurisdiction in the Interstate Commerce Commission over anti-trust questions.

With respect to the charges of discrimination, however, this Court held that different principles were determinative and that the demurrers to those charges were properly sustained on the ground that the District Court was without jurisdiction until the questions involved had been passed upon by the Interstate Commerce Commission. Contentions of the Government to the effect that such a result would impede the prosecution of offenses and that the Interstate Commerce Commission would become "practically the court of final criminal resort" were dismissed on the ground that the Interstate Commerce Act had civil and administrative phases, as well as criminal, and that the procedure adopted would permit the exercise of civil and criminal remedies, each in its proper circumstances. The Court stated that it would be an erroneous view that the great problems which the Interstate Commerce Act was intended to solve

[10] 228 U. S. 87 (1913).

should be considered of less consequence than the facility to be given a particular remedy.

The reasoning followed by this Court in the *Pacific & Arctic* case, as applied to matters within the jurisdiction of the Interstate Commerce Commission over interstate commerce, is equally applicable to the Federal Trade Commission in its jurisdiction over foreign trade.

From the foregoing, it is submitted that the decision in the *Pacific & Arctic* case, rather than supporting the Government, in fact supports the position of these petitioners.

If any conclusion with respect to statutes other than those there involved can be drawn from the *Borden* and the *Pacific & Arctic* cases, it is that the determination of the extent to which primary jurisdiction may be exclusively exercised by a commission must be made with respect to each statute in the light of its particular provisions and the purposes sought to be attained thereby. Until this determination with respect to the Webb-Pomerene Act is made by this Court, existing uncertainty will continue.

The Legislative History of the Act

The record of the Congressional proceedings upon the adoption of the Webb-Pomerene Act is indicative of "the environment at the time of the enactment"[10a] as bearing upon the Congressional intent that the initial determination of whether there has been a departure from the permissible limits of the Act and a resulting violation of the Sherman Act is entrusted to the Federal Trade Commission rather than the courts.

[10a] *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 50 (1910).

The Congressional debates also indicate an intent that, as to trade within the nation, the Sherman Act was not to be considered repealed, or its effectiveness diminished, by enactment of the Webb-Pomerene Act. This is wholly consistent with the construction stated above, namely, that the Commission has primary jurisdiction. The operation and effectiveness of the Sherman Act is not impaired thereby—there is merely an imposition of a different tribunal which makes the initial determination. After the Commission has exercised its powers and the effort has proved unsuccessful, the course of procedure under the Sherman Act becomes operative and fully effective.

The debates, read as a whole, support this interpretation. Isolated statements, bearing one way or another, when divorced from their context or from the whole general scheme, may be misleading, but some indication of the circumstances attendant upon the enactment, as relating to Congressional intent appears from the following extracts:

(a) The Senate Report:[11]

> "Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, so that they may determine whether and to what extent the laws have been violated."

(b) By Mr. Pomerene:[12]

> "Our thought was that, if we could frame this bill in such a way as to show the real purpose, the general

[11] No. 1056, 64 Cong. 2nd Sess. at pp. 3-4 (on H. R. 17350).
[12] Cong. Rec. Vol. 55, Part 3, p. 2788.

purpose, with respect to foreign trade, the Federal Trade Commission could be trusted to apply it to cases arising in practice.

"Mr. Weeks. Mr. President, assuming that we are willing to do that and that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?

"Mr. Pomerene. It might do that.

"Mr. Kellogg. Mr. President—

"Mr. Pomerene. But, if the Senator from Minnesota will permit me, if it related to the foreign trade—and that is the purpose of this bill—I think it is pretty clear, at least it is clear to my own mind, that the criminal penalties under the Sherman anti trust law would not apply to these foreign contracts or associations."

(c) Mr. Pomerene:[13]

"* * * we have provided particularly that all the operations of these associations shall be subject to the jurisdiction and control of the Federal Trade Commission; and if in anywise they may be interfering with what may be regarded as fair competition, or if they may be violating the laws of the land—trust laws or others—then the Federal Trade Commission can investigate and make orders respecting the conduct of their business; and if they fail to comply with these orders, then these matters may be certified over to the Department of Justice for such action as they may think proper."

(d) Mr. Kellogg:[14]

"So the bill not only protects the competitor in the export trade, but it gives the Federal Trade Commission jurisdiction over the entire subject."

[13] Cong. Rec. Vol. 55, Part 7, p. 7326.
[14] Cong. Rec. Vol. 56, Part 1, p. 111.

(e) By Mr. Pomerene:[15]

"Mr. Pomerene. Mr. President, the Senator from Iowa has several times made the statement that it was the intention of this bill to repeal the Sherman anti trust law in so far as it applies to our foreign trade. I submit to the Senator that that overstates the purpose of the bill. We are very careful in this bill to provide that where restraint is due to unfair methods of competition they will be subject to control by the Federal Trade Commission, and also they have the power after investigation to refer these matters to the Department of Justice for such action as that department may deem proper. It is true it authorizes combination and associations, and to that extent it does repeal the act, but it does not permit the use of any unfair method of competition in the way of interfering with the foreign trade."

The construction of the Act that petitioners urge is not a novel one. A pamphlet entitled "The Export Trade Act", issued in November 1935 by the Bureau of Foreign and Domestic Commerce of the Department of Commerce, contains the following at page 1:

"Although there are restrictions in the Act which may seem burdensome, these were placed there to safeguard our traditional policy of open competition in industry.

"If upon investigation by the Federal Trade Commission of an act of an export association it is deemed to be a violation of the law, the offender is not penalized but reminded of the fact and directed to amend its ways. Only upon failure to comply with the recommendations of the Commission will the matter be brought to the attention of and for action by the Attorney General."

[15] Cong. Rec. Vol. 56, Part 1, p. 119.

3. This Case Presents a Question of General Public Importance Concerning the Respective Jurisdictions of Commission and Court.

This Court has consistently upheld Congressional purposes to utilize, in the administration and enforcement of complex regulatory statutes, the "expert, informed judgment"[16] and "experience and discretion"[17] of administrative commissions and has sought to give effect to Congressional intent to delegate functions "to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests".[18]

The growing complexities and interrelations of economic and social problems have been recognized by this Court as creating a need for an administrative process that can deal expertly, at least in the first instance, with particular problems that require a background of factual knowledge and experience.

The field of economy dealt with by the Webb-Pomerene Act presents just such a situation. While the President and Congress sought to stimulate the development of foreign trade,[18a] it was recognized that, because of its close interrelation with domestic trade, measures of regulation and supervision were required. The ramifications and technical aspects of foreign trade, its many effects upon domestic commerce and its bearing upon the economic conditions of the nation are matters which are peculiarly susceptible to administration by an "experienced" body having "expert, informed judgment".

---

[16] *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 539, 568 (1943).

[17] *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509 (1943).

[18] *Gray* v. *Powell*, 314 U. S. 402, 412 (1941); see also *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485 (1931).

[18a] Cong. Rec. Vol. 55, Part 1, pp. 31, 32; Cong. Rec. Vol. 56, p. 181.

To accomplish its purposes, Congress entrusted primary jurisdiction over enforcement of its policies to such a body, the Federal Trade Commission. Its organization and experience well fitted it for the function, and it is a matter of common knowledge that proceedings under the Act have been and are being taken by the Commission. If, however, as concluded by the District Court, the courts may act in the same sphere, without awaiting initial action by the Commission, the purposes and intent of Congress are to that extent nullified and the administrative process deprived of its value.

As this Court has said:[19]

> "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

The application of this view is reflected in the doctrines of "primary jurisdiction" and "exhaustion of administrative remedies", both of which this Court has been careful to maintain in order to give effect to Congressional purposes.[20] The former has particular pertinence here.

By the provisions of Section 5 of the Webb-Pomerene Act, a specific procedure for enforcement of the Act is pro-

[19] *United States* v. *Morgan*, 307 U. S. 183, 191 (1938).

[20] *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139 (1939); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51 (1938); *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); *Gray* v. *Powell*,

(Footnote continued on page 18)

vided and the Congressional purpose seems apparent that the Commission is entrusted with exclusive primary jurisdiction over the subject matter of the Act, namely, foreign trade associations, their acts, agreements and acts pursuant thereto. The point at which this jurisdiction ceases and that of the court commences, upon action by the Attorney General, is clearly expressed.

The District Court concluded that in determining the line of demarcation between the functions of court and commission it was bound by the decision of this Court, under another statute, in *United States* v. *Borden*,[21] which as we have heretofore shown is not controlling. In so doing it interpreted the Webb-Pomerene Act as to deprive the Commission of its initial jurisdiction.

This important question of the respective functions and jurisdictions of court and commission requires a final determination by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States District Court for the Southern District of New York, commanding that court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket "No. Civ. 24-464, *United States of America* v. *United States Alkali Export Association, Inc., et als.*", to the end that said cause may be reviewed and determined by

(footnote continued from page 17)

314 U. S. 402 (1941). In the latter case, this Court said (at p. 412): "Where as here a determination has been left to an administrative body, this delegation will be respected and the administration conclusions left untouched. * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

[21] 308 U. S. 188 (1939).

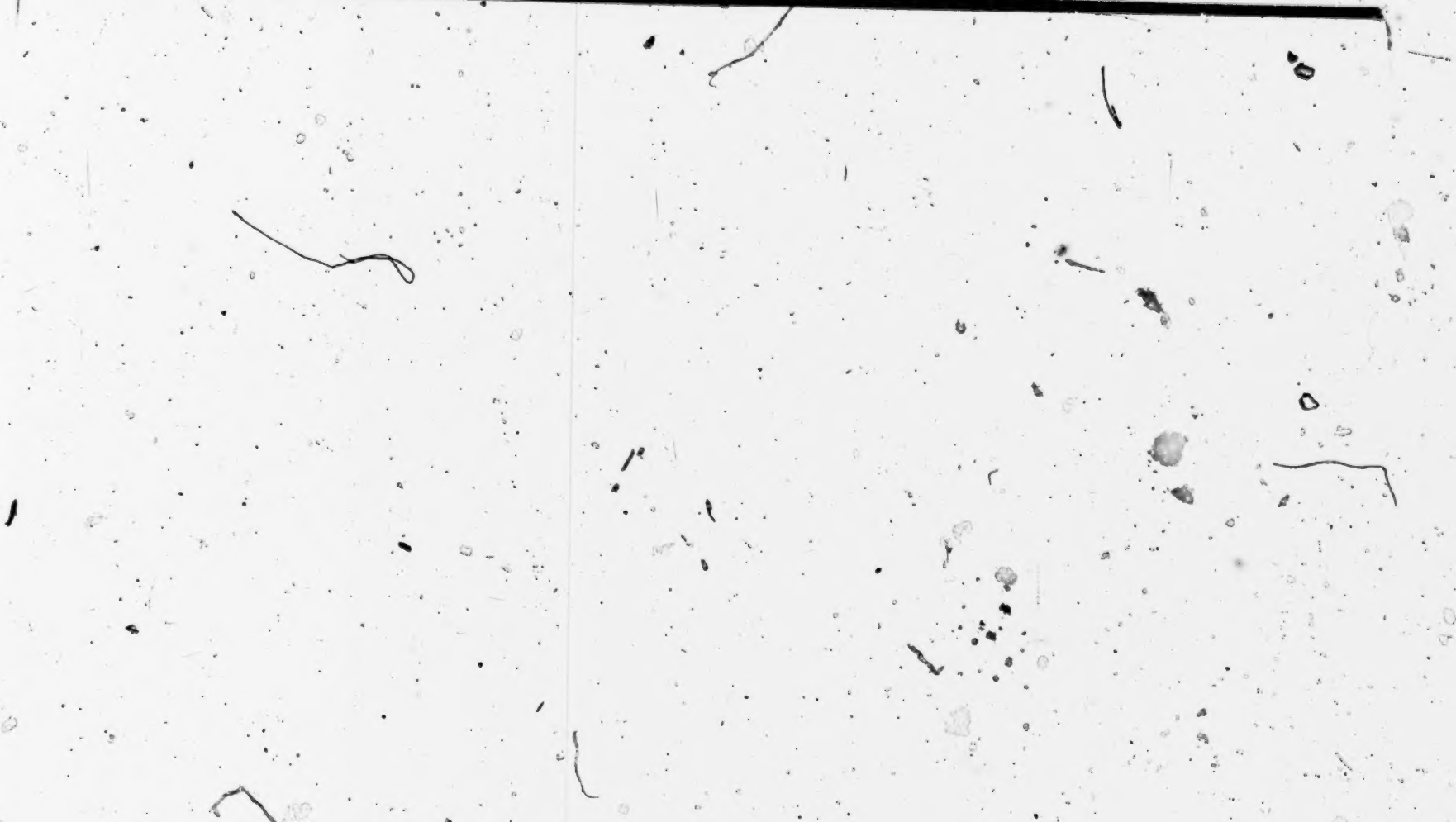
this Court; that the order of said District Court entered January 12, 1945 be reversed; that the complaint therein be dismissed; and that your petitioners be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated January 22, 1945.

FRED N. OLIVER,
Attorney for Petitioners,
110 East 42nd Street,
New York 17, N. Y.

C. W. HOBSON,
EDWARD D. KYMAN,
JOHN L. REITH,
WILLARD P. SCOTT,
Of Counsel.

[APPENDIX FOLLOWS.]



APPENDIX.

Webb-Pomerene Export Trade Act.

Section 2 (40 Stat. 517; 15 U. S. C. A. § 62):

"That nothing contained in the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association or which substantially lessens competition within the United States or otherwise restrains trade therein."

Section 5 (40 Stat. 517; 15 U. S. C. A. § 65):

"That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by laws, and if unincorporated, a copy of its articles or contract of association, and on

the 1st day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade

therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

"For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes'."

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 6 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION, *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT BRIEF OF PETITIONERS

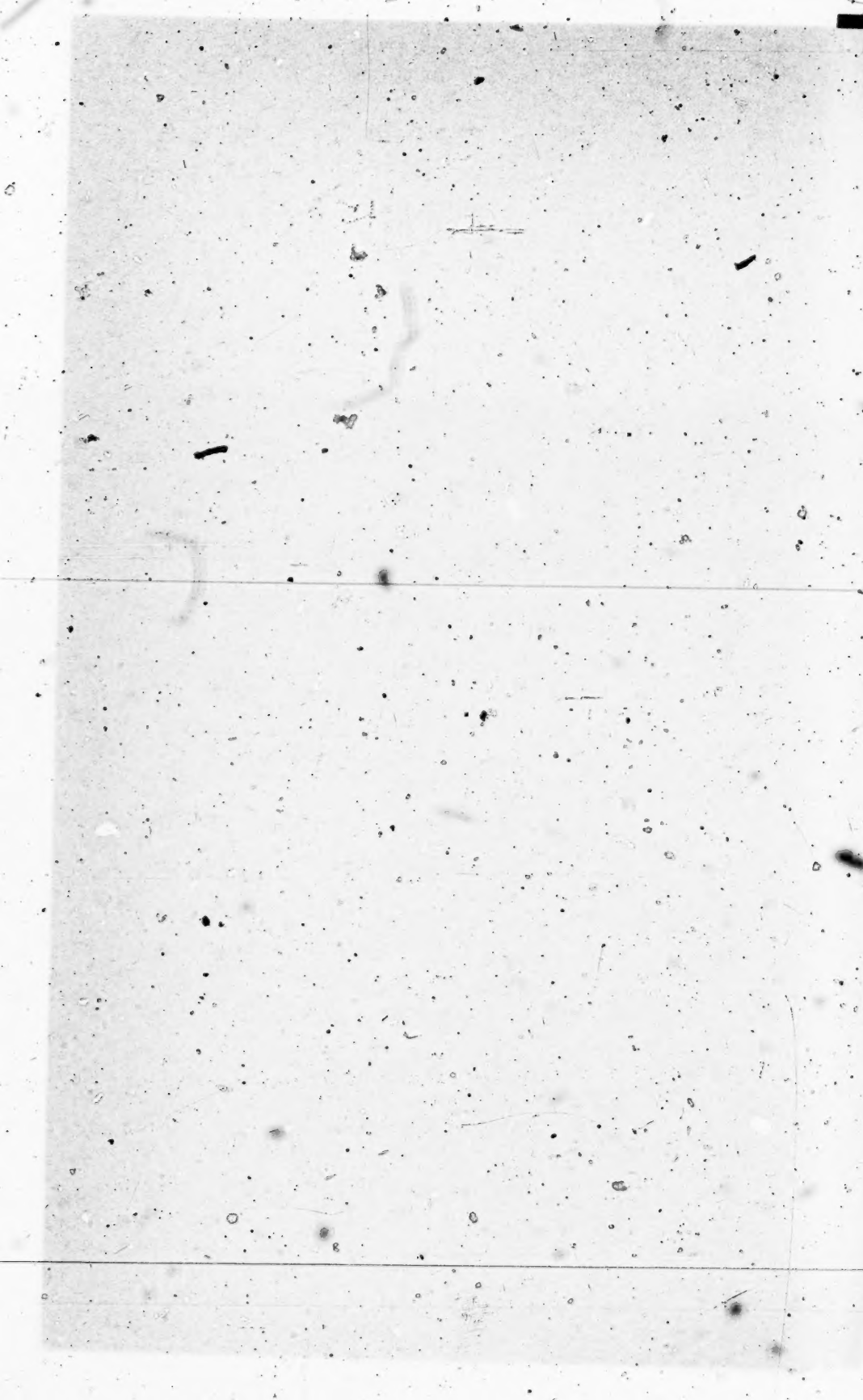
LELAND HAZARD
DAVID A. REED
CALVIN A. CAMPBELL
ROBERT T. MCCRACKEN
E. C. LEWIS
RALPH S. HARRIS
WILLIAM E. SIMS
H. G. HITCHCOCK
H. WEBSTER STULL
J. E. F. WOOD
F. C. LOWTHORP
BRUCE BROMLEY
GEORGE S. COLLINS
JOHN LOGAN O'DONNELL
Of Counsel in No. 1016

WM. DWIGHT WHITNEY
Counsel for Petitioners in No. 1016,
15 Broad Street,
New York, N. Y.

C. W. HOBSON
EDWARD D. LYMAN
JOHN L. REITH
WILLARD P. SCOTT
Of Counsel in No. 1017

FRED N. OLIVER
Counsel for Petitioners in No. 1017,
110 East 42d Street,
New York, N. Y.

April 4, 1945.



INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statutes	3
As to the Writ	3
As to the Merits	4
Statement	10
Outline of the Complaint	12
Summary of Argument	18
Part One	18
Part Two	19
Argument	24
Part One. As to the appropriateness of exercise of the common law writ of certiorari	24
I. The Court has power to grant the writ	24
II. In an anti-trust case the writ may be granted only by this Court	24
III. A traditional ground for exercise of the power has been to correct an excess of exercise of jurisdiction by the District Court	26

PAGE

IV. There are combined in this case the considerations of excess of exercise of jurisdiction below and public importance of the question presented 29

V. The imponderable factors 31

Part Two. As to the merits 33

I. The structure of the statute shows a Congressional determination to entrust to the Federal Trade Commission an exclusive primary jurisdiction over the question whether agreements or acts of export trade associations are violative of the Antitrust Laws ... 33

II. The decided cases in other fields recognize the principles under which the jurisdiction of the Federal Trade Commission must be exclusive in the field entrusted to it by the Congress 47

III. The intent of the Congress to that effect finds support in the circumstances of the time and was clearly expressed in the debates ... 61

(a) The surrounding circumstances when the Act was passed 61

(b) The Congressional Debates and Committee Reports 64

Conclusion 76

TABLE OF CASES

	PAGE
Abby Dodge, The, 223 U. S. 166	63
American Life Ins. Co. v. *Stewart*, 300 U. S. 203	27
Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427	63
Board of Trustees v. *United States*, 289 U. S. 48	63
Brolan v. *United States*, 236 U. S. 216	63
Buttfield v. *Stranahan*, 192 U. S. 470	23, 64
Central Transfer Company v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469	51
Chetwood, In re, 165 U. S. 443	26, 27, 28
Enelow v. *New York Life Ins. Co.*, 293 U. S. 379	27
Georgia v. *Pennsylvania Railroad Company*, No. 11 Orig., Oct. Term 1944	20, 22, 25, 45, 57, 58
McClellan v. *Cartland*, 217 U. S. 268	27
McLean Trucking Company v. *United States*, 321 U. S. 67	22, 57, 59
Metropolitan, Ex Parte, Water Co., 220 U. S. 539	26
Northern Pacific, Ex Parte, Ry. Co., 280 U. S. 142	26
Paramount Famous Corporation v. *United States*, 282 U. S. 30	35
Peru, Ex Parte, 318 U. S. 578	24, 26, 28
Regina v. *Yarrington*, 1 Salkeld 406, 91 English Reports 353 (Q. B. 1710)	28
Roche v. *Evaporated Milk Association*, 319 U. S. 21	24
Simons, Ex Parte, 247 U. S. 231	27
Skinner, Ex Parte, & Eddy Corp., 265 U. S. 86	27
Sprague v. *Ticonic Bank*, 307 U. S. 161	28

PAGE

The King v. *The Justices of the West Riding of Yorkshire*, 5 Term Reports 629, 101 English Reports 352 (K. B. 1794) 28
The King v. *The Justices of Somersetshire*, 5 Barnewall & Cresswell 816, 108 English Reports 303 (K. B. 1926) 28
The King v. *Judge Clements*, [1932] 2 K. B. 535 28
The King v. *Middlesex Justices*, [1933] 1 K. B. 72 28
United States, Ex Parte, 287 U. S. 241 20
United States v. *Borden Company*, 308 U. S. 188, 11, 21, 52, 54
United States v. *California Co-operative Canneries*, 279 U. S. 553 ..... 24, 32
United States v. *Pacific & Arctic Railway and Navigation Company*, 228 U. S. 87 ..... 21, 22, 49, 50
United States v. *South-Eastern Underwriters Association*, 322 U. S. 533 ..... 19, 39
Virginia, Ex Parte, 100 U. S. 339 20
Weber v. *Freed*, 239 U. S. 325 64

STATUTES AND MISCELLANEOUS

Agricultural Marketing Agreement Act 52
Capper-Volstead Act 52, 53, 54
Clayton Act 9, 27, 35, 40, 46
Expediting Act 4, 24, 25
Federal Trade Commission Act 51
Judicial Code 3, 28
Judiciary Act of 1789, 1 Stat. 81 24

PAGE

Motor Carrier Act of 1935 60
Norris-LaGuardia Anti-Injunction Act 27
Robinson-Patman Act 35
Sherman Anti-Trust Act 8, 50
Webb-Pomerene Act 4, 33
Senate Reports 9 and 109, 65th Cong., 1st Sess. 68
Senate Report (No. 1056, 64th Cong., 2nd Sess.) (accompanying H. R. 17350) 67
House Report No. 50 (65th Cong., 1st Sess.) (accompanying H. R. 2316) 65
Cong. Rec., Vol. 54, Part 1, pp. 31, 32 66
Cong. Rec., Vol. 55, Part 3, p. 2785 61
Cong. Rec., Vol. 55, Part 3, p. 2786 69
Cong. Rec., Vol. 55, Part 3, p. 2788 70
Cong. Rec., Vol. 55, Part 4, p. 3570 69
Cong. Rec., Vol. 55, Part 7, p. 7326 72
Cong. Rec., Vol. 56, Part 1, p. 111 72
Cong. Rec., Vol. 56, Part 1, p. 119 73
Cong. Rec., Vol. 56, Part 1, p. 170 74
Cong. Rec., Vol. 56, Part 4, pp. 3564-3565 61
Cong. Rec., Vol. 62, Part 2, p. 2050 62
Federal Trade Commission Report entitled "Cooperation in American Export Trade" 64
Final Report of the Executive Secretary of the T. N. E. C., Senate Committee Print, 77th Cong., 1st Sess., p. 101 64
"The Export Trade Act", by the Department of Commerce (Bureau of Foreign and Domestic Commerce), p. 1 75

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., *et al.*, *Petitioners,* *against* UNITED STATES OF AMERICA, *Respondent.*	No. 1016
CALIFORNIA ALKALI EXPORT ASSOCIATION, *et al.*, *Petitioners,* *against* UNITED STATES OF AMERICA, *Respondent.*	No. 1017

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 53-56) has not been reported.

JURISDICTION

Jurisdiction of this Court rests upon the provisions of § 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 377). Further consideration of the question of jurisdiction will be included as Part One of the Argument. Concisely stated, the petitioners' view is that grant of the common law writ of certiorari is appropriate in the present case because it is (a) one of public importance in a field in which (b) appellate jurisdiction lies exclusively in this Court and not in the Circuit Court of Appeals, and (c) the question presented is whether the District Court acted in excess of its jurisdiction where (d) primary jurisdiction had been exclusively entrusted by the Congress to a federal administrative tribunal,—the Federal Trade Commission.

The petitioners assume that, in granting the writ, this Court has already determined that the questions presented are of public importance. The petitioners will also assume in this brief that the Court has already exercised its discretion as to the importance of the subject presented. We understood that the power to grant the writ and the importance of the question were conceded by the Solicitor General in his submission in opposition to the writ, and that the points upon which the Court wishes further argument relate to the element of *appropriateness* in the grant of the writ "at the present stage of the proceedings."

STATUTES

AS TO THE WRIT

Judicial Code

Act of March 3, 1911, c. 231, 36 Stat. 1087, 61st Cong., 3rd Sess. (S. 7031, Public 475), as amended.

§ 262 (28 U. S. C. § 377) Power to issue writs. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

* * * * *

Sec. 24. (28 U. S. C. § 41) The district courts shall have original jurisdiction as follows: * * *

Twenty-Third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

* * * * *

Sec. 238. (28 U. S. C. § 345) A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination'

of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

Expediting Act

Act of Feb. 11, 1903, c. 544, 32 Stat. 823, 57th Cong., 2d Sess. (S. 6773, Public 82), as amended by Act of June 25, 1910, c. 428, 61st Cong., 2d Sess., 36 Stat. 854 (H. R. 26233, Public 310).

Sec. 1. (15 U. S. C. § 28) In any suit in equity pending or hereafter brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, * * *.

Sec. 2. (15 U. S. C. § 29) In every suit in equity pending or hereafter brought in any district court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof; * * *.

AS TO THE MERITS

The Webb-Pomerene Act

Act of Apr. 10, 1918, c. 50, 40 Stat. 516, 65th Cong., 2d Sess. (H. R. 2316, Public 126).

Sec. 1 (15 U. S. C. § 61) The words 'export trade' wherever used in this Act mean solely trade

or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale. * * *

The word 'association' wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

Sec. 5 (15 U. S. C. § 65) Every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, prac-

tices, management, and relation to other associations, corporations, partnerships, and individuals. * * *

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in 'An Act to create a Federal Trade Commission', to define its powers and duties, and for other purposes.

The balance of § 5, and § 2, are next set out in parallel columns, showing their parallel employment of the same terminology:

§ 2 (15 U. S. C. § 62)	§ 5 (15 U. S. C. § 65)
Nothing contained in sections 1-7, inclusive, or section 15 of this title shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association,	*Earlier part of this section is printed above.*
provided such association, agreement, or act is not in restraint of trade within the United States,	Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States
and is not in restraint of the export trade of any domestic competitor of such association:	or in restraint of the export trade of any domestice competitor of such association,

Provided, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association

or which substantially lessens competition within the United States or otherwise restrains trade therein.

or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association,

or which substantially lessens competition within the United States or otherwise restrains trade therein,

it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommen-

dations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

Sherman Anti-Trust Act

Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended.

Sec. 1. (15 U. S. C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the the several States, or with foreign nations, is hereby declared to be illegal:

* * * * *

Sec. 2. (15 U. S. C. § 2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty * * *.

* * * * *

Sec. 4. (15 U. S. C. § 4) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Clayton Act

Act of Oct. 15, 1914, c. 323, 38 Stat. 730, 63d Cong., 2d Sess. (H. R. 15657, Public 212), as amended.

Sec. 1. (15 U. S. C. § 12) 'Antitrust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' approved February twelfth, nineteen hundred and thirteen; and also this Act.

* * * * *

Sec. 11. (15 U. S. C. § 21) Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

* * * * *

Sec. 15. (15 U. S. C. § 25) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

Sec. 16. (15 U. S. C. § 26) Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act * * * *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eight-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT

This case presents a question of jurisdiction under the Webb-Pomerene and Sherman Acts. It is a case of first impression. The precise question is whether a United States District Court exceeds its jurisdiction in entertaining a suit in equity initiated by the Attorney-General under the Sherman Anti-Trust Act against an export trade association formed under the Webb-Pomerene Export Trade Act, which suit involves only acts done by, or in alleged combination or conspiracy with, such Association, in the

absence of a showing under § 5 of the Webb-Pomerene Act that the matter had been referred to the Attorney-General by the Federal Trade Commission.

In this case there had been no prior proceedings before the Federal Trade Commission or reference by the Commission to the Attorney General. Suit was instituted in the ordinary way under § 4 of the Sherman Act, by summons (R. 1) and complaint (R. 2) filed in the District Court on March 16, 1944.

On April 26, 1944, the petitioners in No. 1016 moved, pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure to dismiss the compaint on the ground that the District Court did not have jurisdiction of the subject-matter because exclusive jurisdiction was vested in the first instance in the Federal Trade Commission. It was stipulated on May 26, 1944, between plaintiff and the defendants (petitioners here) in No. 1017 (R. 52) that said defendants had filed a similar motion to dismiss.

The motion was argued before United States District Judge Coxe, and on December 26, 1944, he filed his opinion denying the motion (R. 53). The denial was principally upon the ground that the case was indistinguishable from *United States* v. *Borden*, 308 U. S. 188 (R. 55). An order was entered thereon on January 12, 1945 (R. 56), containing a provision as to the date upon which the defendants should answer, plead or otherwise move, and a further provision for an extension of time therefor in the event that this Court should grant a writ of certiorari. Although the record does not show it, an order, subsequent to the grant of the writ herein, has been entered by the District Court extending the time of the defendants to answer, plead or otherwise move until thirty days after the decision by this Court.

Petitions for writs of certiorari were presented for filing promptly with this Court,—in No. 1016 on January 17, 1945, five days after the entry of the District Court order, and in No. 1017 on January 23, 1945, and were followed by motions for leave to file. The writs were issued on March 5, 1945, cases Nos. 1016 and 1017 being consolidated for argument, and counsel being "requested to discuss in their briefs and upon oral argument the question of whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by a writ of certiorari under section 262 of the Judicial Code."

OUTLINE OF THE COMPLAINT

For the purpose of this motion the precise allegations of the complaint are of secondary importance. It is necessary only to appreciate that the Attorney General is charging agreements made and acts done by the various corporate defendants in combination and conspiracy with the export trade association defendants.

The first four headings of the complaint (I. JURISDICTION AND VENUE, II. THE DEFENDANTS, III. THE CO-CONSPIRATORS, IV. NATURE OF THE TRADE AND COMMERCE INVOLVED AND BACKGROUND OF THE CONSPIRACY) are introductory merely and do not directly affect the question. Summarized:

They define and describe the nature and constituents of alkalis and the processes by which they are produced.

And they name and identify the defendants, which are:

(1) The Alkali Export Association (known as Alkasso).

(2) The 11 other moving defendants in No. 1016—members of the Alkali Export Association.

(3) The California Association (known as Calkex)—another Webb Act Association—and its two members. These are the moving defendants in No. 1017.

(4) Imperial Chemical Industries, Ltd., which is the dominant chemical company in Great Britain, and its New York subsidiary of similar name, hereinafter together called ICI.

Also, the so-called "Co-Conspirators", viz.:

(1) American Potash & Chemical Corporation substantially all of the capital stock of which has been seized by the Alien Property Custodian.

(2) Belgian Solvay and its New York subsidiary of similar name.

(3) The German company, I. G. Farben.

Under V, "VIOLATIONS OF LAW", it is alleged that

"defendants Alkasso and ICI and those defendants who were members of Alkasso in 1924 * * * and the remaining defendants from the time of their respective admission as members * * *"

have been engaged in an unlawful combination and conspiracy. The theory is that the conspiracy consisted in joining the Association (Complaint par. 41, R. 11).

The particularized allegations of violations of law divide into three portions. The first is the portion dealing with alleged agreements with foreign interests (the "cartel agreements"). If jurisdiction be found, these may eventually present an issue as to the meaning of the main provi-

sion of the Webb-Pomerene Act that agreements and acts made by an association "in the course of export trade" are exempt from the Sherman Act.

The second and third portions of the complaint,—portions headed by the two sub-headings at pp. 31 and 37,—present an enquiry under two specific provisos of the Webb-Pomerene Act[1] and are entitled respectively "ALKASSO'S CONTROL OVER EXPORTS BY ITS DOMESTIC COMPETITORS" and "STABILIZATION OF DOMESTIC PRICES".

Considering these three parts in order:

(1) Alleged international cartel agreements.

Under the sub-paragraphs of paragraph 41 (R. 11) Alkasso, Calkex and "their respective members" are alleged to have agreed not to compete, and to accept assignment of marketing areas as their joint exclusive territory, and not to export to the territories assigned to the foreign companies, etc.

In par. 43 (R. 14) Alkasso and ICI are alleged to have agreed to refrain from exporting alkalies to the United States. Accordingly, says par. 44 (R. 14), Alkasso, "acting on behalf of itself and its members", entered into an agreement with ICI evidenced by a written memorandum attached to the complaint as Exhibit A. Allegations as to subsequent agreements by Alkasso with ICI throughout the years appear in pars. 44-52, (R. 14-20), and in the balance of the Exhibits.

Finally, in par. 53 (R. 22) it is generally alleged that each of the member companies participated in the negotiation of the agreements, accepted their benefits and obli-

[1]Numbered in our analysis of the statute, *infra*, as provisos (ii) and (iii).

gations, and participated in carrying them out. They are followed by particularization of Alkasso as the party which

> "allocated to each of its member companies a certain percentage of the total exports of alkalies comprising the Alkasso quota."

This is followed by the allegation that Alkasso,

> "to assure compliance by its members with the several agreements which Alkasso had entered into with defendants ICI and co-conspirators Belgian Solvay and I. G. Farben",

maintained until 1940 its position as exclusive foreign sales outlet for its members.

(2) Alleged restraints upon exports by domestic competitors.

Alkasso is alleged to have sought, by causing its member companies to do certain alleged acts, to restrain the competition of domestic companies which would otherwise have been its competitors for export trade. To that end Alkasso is alleged, in pars. 55, 56 and 57 (R. 23), to have caused the organization of a similar Association on the Pacific Coast known as Calkex, and to have entered into an understanding with Calkex agreeing upon market quotas, etc. In par. 59 (R. 25), we are told that the means for checking up on developments abroad was through "the foreign agencies or representatives of Alkasso and ICI". So far as Alkasso's members were concerned, they acted under the direction of Alkasso, which "*required* its members to report to it the names of all independent exporters * * *". And Alkasso is then charged with having exchanged information with ICI.

In par. 60 (R. 25) comes the express allegation of concerted action to eliminate competition from independent manufacturers. "Alkasso and ICI have taken concerted action as part of the conspiracy herein alleged to eliminate competition from such independent manufacturers". And Alkasso "has offered to act as the agent to handle the exports of such independent manufacturers or to purchase all of their alkalis to be exported * * *". Thus is Alkasso charged with having acted (to quote the statute) "in restraint of the export trade of any domestic competitor of such association".

Par. 60 (R. 25) concludes that by the acts aforesaid "Alkasso has succeeded in gaining control of most of the export trade of such independent domestic manufacturers * * *".

Par. 61 (R. 26) purports to analyze "the principal obstacle" which Alkasso has encountered in this alleged wrongful undertaking. Such principal obstacle was presented by the sales by independent dealers or exporters who had purchased their supplies from its members or from independent manufacturers. Alkasso is alleged to have met the obstacle by causing its own officers, agents and representatives abroad to investigate and police the sales; by requiring its members to refrain from selling to such exporters; and by instructing its agents abroad to undersell such independent exporters and to disparage the quality of their products.

(3) Alleged "Stabilization of Domestic Prices".

These allegations relate principally to alleged efforts to increase the price of caustic soda by taking an excessive supply off the domestic market. The means, R. 28, are

again "the agreements between Alkasso and ICI hereinabove set forth and (by) their practices thereunder". Alkasso is charged with having systematically allocated quotas between its members, and when the members were entitled to receive increases in their quotas, these were "given" to them by Alkasso. Reciprocally, reduced quotas were "accepted" by the defendant members, when Alkasso in its systematical allocation thought proper to reduce them.

The general scheme and structure of the whole pleading is that the head and center of the combination and conspiracy was in Alkasso itself and that Alkasso either directed, or at the very least was a participant in, every agreement and every act.

This makes it utterly impossible to disassociate any allegation of the complaint from the subject-matter which it would be appropriate for the Federal Trade Commission to undertake in carrying out its investigatory function under Section 5 of the Webb-Pomerene Act.

SUMMARY OF ARGUMENT

PART ONE

The case is an appropriate one for exercise of the common law writ of certiorari. Appellate jurisdiction in anti-trust cases is vested in this Court, and no question therefore arises whether it would have been appropriate to leave the parties to remedies in the Circuit Court of Appeals.

A traditional ground for exercise of the power has been to correct an excess of exercise of jurisdiction by the District Court. The writ is regularly used for this purpose in England. Although this Court has not fettered its discretion by any such established practice, the same type of case in which the writ has become regular practice in England remains an apt class within which this Court may exercise its discretion. This is particularly so if other favoring factors be present.

There are combined in this case the considerations of excess of exercise of jurisdiction below and public importance of the question presented. Indeed, there are combined in this case an unusual group of favoring factors, including: (a) absence of jurisdiction in the Circuit Court of Appeals, (b) a question of a character traditionally justifying the grant of the writ, (c) a question of public importance, (d) a novel question of law, and (e) a question in which a maximum saving of time in the case as a whole may be gained without requiring from this Court the consumption of time that would be necessary to consider an extended record.

PART TWO

I

The structure of the Webb-Pomerene Act shows a Congressional determination to entrust to the Federal Trade Commission an exclusive primary jurisdiction over the question whether agreements or acts of export trade associations are violative of the antitrust laws. The provisos in the Webb-Pomerene Act cover the entire field of § 1 of the Sherman Act, under which the Attorney General has brought this case.

The procedural § 5 of the Webb-Pomerene Act follows in identical language the substantive § 2. The procedural section thus covers the entire area covered by § 1 of the Sherman Act and entrusts supervision and control thereof exclusively to the Federal Trade Commission.

The presence in § 5 of an express provision for action by the Attorney General upon reference to him by the Federal Trade Commission negatives the existence of a different and earlier power in him to act.

No provision of the Sherman Act has been repealed. The Webb-Pomerene Act has simply provided that the substantive provisions of § 1 of the Sherman Act shall be procedurally protected by the Commission. The reason is that the field entrusted to the Commission—the field of export trade—intertwines with the field of domestic trade in the same way that interstate trade intertwines with local trade. *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533.

If the Attorney General had the jurisdiction which he claims, it would be a jurisdiction concurrent with or auxi-

liary to that of the Federal Trade Commission. Concurrent jurisdiction in two federal agencies is not to be favored on principle. And within the field of the antitrust laws, Congress has shown that it knows how to provide for concurrent or auxiliary jurisdiction of the Attorney General and of the Federal Trade Commission when it wishes to do so. It did so expressly in three sections of the Clayton Act (§ 2, 3 and 7) and by the procedural sections 11 and 15. The Clayton Act was passed only four years before the Webb-Pomerene Act.

But we do not rest our argument upon rules as to which of two possible constructions shall be favored. We submit that the explicit language of the Webb-Pomerene Act is inconsistent with any construction other than that the jurisdiction of the Federal Trade Commission is to be comprehensive and exclusive until the Commission shall itself refer its findings and recommendations to the Attorney General for such action thereon as he may deem proper.

In so providing, the Webb-Pomerene Act is an illustration of the modern principle that from an act of general application giving effect to the rule of competition as the general rule in commerce, a specific field of commerce may be carved out to be entrusted to an export commission appointed by law and informed by experience. That in such a case primary jurisdiction lies only in that commission, is established beyond dispute, and has recently been recognized by this Court in *Georgia* v. *Pennsylvania Railroad Co.*, Orig. No. 11, Oct. Term, 1944. That doctrine applies against the Attorney General just as it applies against other persons, unless Congress excepts the Attorney General from its application (as again Congress showed its capacity to do by § 16 of the Clayton Act).

II.

The Federal Trade Commission is different from any of the other government commissions in that its dominant function is within the field of the antitrust laws.

The Commission has particular functions just as the other agencies have (e.g. the Interstate Commerce Commission in respect of the national transportation system, or the Secretary of Agriculture in respect of agriculture). Its function in respect of export trade is an example. But, unlike the other commissions, the functions of the Federal Trade Commission are generally within the field of the antitrust laws.

It is therefore not surprising to find that the Webb-Pomerene Act is unlike the other acts of particular application (e.g. the Interstate Commerce Act or the Capper-Volstead Act) in that it entrusts to the jurisdiction of the commission, not a limited portion of the area covered by § 1 of the Sherman Act, but the entire area.

United States v. *Pacific & Arctic Railway and Navigation Company*, 228 U. S. 87 (dealing with the Interstate Commerce Act) is an express decision that the Attorney General's normal jurisdiction is ousted from whatever area is covered by the statute of particular application. On the other hand, *United States* v. *Borden Company*, 308 U. S. 188 (dealing with the Capper-Volstead Act and the Agricultural Marketing Agreements Act) is authority that within the area covered by § 1 of the Sherman Act, but not covered by the statute of particular application, the Attorney General retains his power and the District Court retains its jurisdiction. The problem in each case is to determine how far the statute of particular application goes.

The Webb-Pomerene Act is different from the Capper-Volstead Act in that the latter covers only one small segment of the area of § 1 of the Sherman Act, to-wit such restraints of trade as have the actual effect of enhancing prices (a subject-matter covered by a portion of one of the four provisos in the Webb-Pomerene Act). The *Borden* case is therefore distinguishable.

Deferment of possible criminal proceedings (not involved in this case), and rendering them subject to prior reference of the subject-matter by the Federal Trade Commission to the Attorney General, is also not ground for a forced construction of the express terms of the Webb-Pomerene Act. It is rather expressive of a policy of the Congress of the same character recognized in the *Pacific & Arctic* case, *supra*, 228 U. S. 87, under which the great problems which the Act was intended to solve and the great purposes it was intended to effect are considered of greater consequence than the facility given to some particular remedy.

The applicable principles have been recently reviewed in the Court's opinions in *Georgia* v. *Pennsylvania Railroad Company*, *supra*, Orig. No. 11, Oct. Term 1944 (particularly at Slip Opinion pp. 11-14), and in *McLean Trucking Company* v. *United States*, 321 U. S. 67, particularly at pp. 77-85.

III.

The surrounding circumstances when the Webb-Pomerene Act was passed are remarkably reminiscent of the present times. They constituted a background against which the Congress gave effect to the principle recognized by this Court that foreign commerce is an especially appropriate

field for the exercise of administrative rather than judicial power. *Buttfield* v. *Stranahan*, 192 U. S. 470, and cases following it.

The annals of the Congress conclusively show that such was the Congressional intention. Expressed in the House and Senate Reports, and in the address of President Wilson advocating the legislation, it was repeated in explicit terms by persons in charge of the bill (particularly and repeatedly by Senator Pomerene) that the Act was to confer upon the Federal Trade Commission full and exclusive primary power, both in the field of export trade, and over the problems that Congress realized would arise in the inevitable friction to be generated between the policy to be declared applicable to export trade and the contrary policy to be preserved for application in the field of domestic commerce.

ARGUMENT

PART ONE

AS TO THE APPROPRIATENESS OF EXERCISE OF THE COMMON LAW WRIT OF CERTIORARI

I.

THE COURT HAS POWER TO GRANT THE WRIT.

The availability of the writ, at least in cases other than anti-trust cases, is not open to question. Its use in furtherance of justice has been recurrent in the history of this Court since authority for its grant was provided by § 13 of the Judiciary Act of 1789, 1 Stat. 81; and the leading cases have been recently reviewed in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21; *cf. Ex Parte Peru*, 318 U. S. 578.

II.

IN AN ANTI-TRUST CASE THE WRIT MAY BE GRANTED ONLY BY THIS COURT.

The question in the present case is admittedly one of public importance,—"a significant one", as the government termed it in its brief in opposition to the grant of the writ (p. 11).

It is a question which cannot be considered in any Circuit Court of Appeals. Judicial Code § 238; 28 U. S. C. § 345. Expediting Act of Feb. 11, 1903, c. 544, 32 Stat. 823, 15 U. S. C. § 28. *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 558-9. The question, therefore, which divided the Court in *Ex Parte Peru*, 318 U. S. 578, is absent here.

In the Court's opinion in the *California Canneries* case emphasis was given to the Congressional policy to eliminate unnecessary delay in anti-trust cases. In pointing out that review was confined by the Expediting Act to "final" judgments, the Court's opinion is of course open to the construction that it was announcing a policy that in anti-trust cases review might never be had otherwise than from "final" orders. But this can hardly have been the Court's intention, for it would be strange if the one case in which § 262 might never be available were to be the very one to which Congress had given the particular recognition of importance represented by inclusion within the Expediting Act. It would be to say that the grant of an extraordinary common law writ is to be confined to cases not deemed by the Congress of sufficient public importance to be included within the terms of the Expediting Act. We suggest that the Court's opinion in the *California Canneries* case must, therefore, be necessarily read as excluding and reserving such questions as might call for application of § 262.

The consequences of a different reading might be grave. Suppose, for example, that a single District Judge were to grant in an anti-trust case a far-reaching preliminary injunction, or even a sequestration of property, under some plain misconception of law. A rule that review in anti-trust cases might never be had until "final" judgment might then lead to a denial of most substantial justice. And such a reading would be a misconstruction of § 262 itself. "It is elementary that repeals by implication are not favored." *Georgia* v. *Pennsylvania Railroad Company*, No. 11 Orig., Oct. Term 1944. There is no "clear repugnancy" between the Expediting Act and § 262. The policy of the Expediting Act in favor of interpretation by this Court of statutes

of particular public importance is happily consistent with the provision to this Court under § 262 of a wide power to make its jurisdiction effective "in furtherance of justice", *In re Chetwood*, 165 U. S. 443, 462.

III.

A TRADITIONAL GROUND FOR EXERCISE OF THE POWER HAS BEEN TO CORRECT AN EXCESS OF EXERCISE OF JURISDICTION BY THE DISTRICT COURT.

The present case is one to correct an alleged exercise of jurisdiction by the District Court in excess of its powers. This is a field in which the appropriateness of the writ was recognized by both the majority and dissenting opinions in *Ex Parte Peru*, 318 U. S. 578, the majority saying (at 583):

> "The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction * * *";

while the dissenting opinion selected for comparison, at p. 591, the leading case on exercise of the writ to correct excess of jurisdiction, *In re Chetwood*, 165 U. S. 443.

In the *Chetwood* case the Circuit Court had sought to restrain prosecution of an action in a State Court; in concluding the opinion of this Court, Mr. Chief Justice Fuller referred to the writ as appropriate "to correct excesses of jurisdiction", at p. 462. See also *Ex Parte Metropolitan Water Co.*, 220 U. S. 539; *Ex Parte Northern Pacific Ry. Co.*, 280 U. S. 142; *Ex Parte Virginia*, 100 U. S. 339, 343.

The rule has particularly appropriate application where the jurisdiction of a federal equity court is sought. It is

fundamental to all equity that it does not act if a common law writ is available; and it is fundamental to all federal courts that they must be heedful of the jurisdiction of the state courts. Assumption by a federal equity court of a jurisdiction that should have been left to the common law or to a state court has more than once provided occasion for issuance by this Court of this writ. In favor of the common law: *Ex Parte Simons*, 247 U. S. 231; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203. In favor of state courts: *In re Chetwood*, 165 U. S. 443; *McClellan* v. *Cartland*, 217 U. S. 268; *Ex Parte Skinner & Eddy Corp.*, 265 U. S. 86.

The Congress has itself shown an increasing tendency to limit the field of federal equity jurisdiction. The Norris-LaGuardia Anti-Injunction Act and the various Reorganization statutes are prominent examples.[2] And this policy has found a place within the anti-trust laws themselves, in § 17 of the Clayton Act, 28 U. S. C. § 381.

We are not of course arguing that the Congress has denied jurisdiction over anti-trust cases as such to the federal equity courts. The question on the merits in this case is whether it has done so in this particular class of anti-trust cases. For the purpose of argument as to the appropriateness of the writ, it is to be assumed *arguendo* in our favor that the Congress did not intend the District Court to have jurisdiction in this particular class of case. What we are here considering, is whether on that assumption the writ is the appropriate remedy.

---

[2] Popular distrust of Chancery procedure has its roots in the past and has taken many forms, from Chief Justice Coke's injunction against proceedings in Lord Ellesmere's Court to Dickens' exposure of *Jarndyce* v. *Jarndyce*.

A direct appeal from a district court to this Court, where the jurisdiction of the court was in issue, was permissible under § 238 of the Judicial Code (28 U. S. C. § 345) prior to its amendment in 1925 (Act of Jan. 28, 1915, c. 22, § 2, 38 Stat. 804; Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 938). The abolition of direct appeals in such cases did not curtail this Court's discretionary power, but rather emphasizes the appropriateness of its exercise where directed to a question as to the jurisdiction of the Court below. *Ex Parte Peru*, 318 U. S. 578, 585, n. 4.

In England one of the most common functions of the writ is to review orders of inferior courts made in excess of jurisdiction. *Regina* v. *Yarrington*, 1 Salkeld 406, 91 English Reports 353 (Q. B. 1710); *The King* v. *The Justices of the West Riding of Yorkshire*, 5 Term Reports 629, 101 English Reports 352 (K. B. 1794); *The King* v. *The Justices of Somersetshire*, 5 Barnewall & Cresswell 816, 108 English Reports 303 (K. B. 1926); *The King* v. *Judge Clements*, [1932] 2 K. B. 535; *The King* v. *Middlesex Justices*, [1933] 1 K. B. 72. While the writ has not been issued as freely by this Court as by the Court of King's Bench (*In re Chetwood*, 165 U. S. 443, 462), nevertheless the consideration that an allegation of excess of exercise of jurisdiction by the lower court is the usual ground for grant of the writ in England may aid this Court in determining when to exercise its discretion here. *cf. Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164-6.

IV.

THERE ARE COMBINED IN THIS CASE THE CONSIDERATIONS OF EXCESS OF EXERCISE OF JURISDICTION BELOW AND PUBLIC IMPORTANCE OF THE QUESTION PRESENTED.

We do not suppose that this Court will wish to adopt any firm rule binding the exercise of "sound discretion" (318 U. S. at 584) which has been its consistent guide in administering § 262; nor do we argue that either excess of jurisdiction in the Court below or the public importance of the question presented need alone suffice to support the issuance of the writ.[3]

What we do suggest, is that excess of exercise of jurisdiction by the Court below has been a familiar type of case for issuance of the writ, and that where that excess is exercised upon a question of public importance, the case for exercise of the Court's discretion becomes especially compelling.

Indeed, it seems that in the present case practically all of the factors are present that might occur upon any application for the writ; and we presume that it was because of the strength of the combination of the factors that the Court has in fact granted the writ. They include:

(a) That this is a case in which the circuit courts of appeal have no appellate jurisdiction and the appellate supervision of the district courts is accordingly the peculiar responsibility of this Court.

(b) That if the district court erred in the present case, its error lay in excess of jurisdiction.

---

[3] Although they were given as alternative reasons for grant of the writ in *Ex Parte United States*, 287 U. S. 241, 248-9.

(c) That if it erred, the error was committed in a case of "significant" public importance.

(d) That the question presented is a new one, and one in which that special doubt attaches to the jurisdiction which can only arise in a case in which for the first time the prosecuting officer is asserting the particular jurisdiction, notwithstanding that the statute under which he purports to act has been in existence for a quarter of a century and that it is in a field which, far from being overlooked or neglected, has been a major field of activity for the Department of Justice throughout the entire period.

(e) That a period of years may well elapse, as has so often been the case under the anti-trust laws, before final judgment; whereas the very fact that the case may come here upon the allegations of the complaint alone enables this Court to make a prompt disposition of the fundamental question presented.

To summarize, we have these factors, all persuasive upon the exercise of discretion:

(a) Remedy exclusive in this Court. Absence of the question whether application should first have been made to a Circuit Court of Appeals.

(b) A question of the character traditionally justifying grant of the writ.

(c) A question of public importance.

(d) A novel question of law.

(e) A question in which a maximum saving of time in the course of the case as a whole may be gained with-

out requiring from this Court the consumption of time that would be necessary to consider an extended record.

V.

THE IMPONDERABLE FACTORS.

We have attempted to assist the Court with an itemized analysis of particular factors that may weigh in the exercise of what in the end must be a general discretion. But if it be preferable to regard the problem as a whole, it becomes at once apparent that we are here dealing with a question so fundamental that, instead of the usual presumption applying against its review through an unusual form of procedure, the presumption may well be the other way.

If we ask ourselves what branch of the law is receiving greater public attention today, or calling for more extended attention on the part of this Court, or for more onerous or longer extended labors in the district courts, than the anti-trust laws, the answer must be: None. Bearing always in mind that the question of exercise of procedural discretion to grant the writ is to be approached upon the assumption that in the end the petitioner is in the right on the merits, the Court is presented with this alternative: Either to make a prompt disposition of a problem already now before it, or because of a procedural scruple to leave the Department of Justice and these 15 defendants and the 2 British-controlled defendants to an extensive trial, with all of the paraphernalia of procedure before trial and admission of voluminous evidence which characterize modern equity trials (at least in this field), and with the prospect of the case returning here after some years upon a record

as extensive, and as expensive, as it will be irrelevent to the question of jurisdiction now presented.

We do not suggest that the "procedural scruple" ought not to be entertained. It is indeed of importance that the gate not be opened to a flood of petty applications under § 262. On the other hand, it is equally plain that this Court is not going to adopt the alternative of rendering § 262 a dead letter.

Our submission, then, is this: That in a period when, consequent upon vastly increased appropriations, an alert and expanded personnel in the Department of Justice is striking out into new fields in the administration of the anti-trust laws, there must arise potent occasions for use of the practical instrument available in § 262 to guide the district courts on these new paths.

It must be perfectly evident that the legislative policy of expediting anti-trust suits recognized by this Court in the *California Canneries* case, 279 U. S. 553, has not had a happy history. The principal cause of the unfortunate prolongation of anti-trust suits has lain in the building up of the enormous records which have characterized this type of litigation. Although we do not by any means suggest that this Court will wish to inaugurate a habit of interlocutory review in such cases, we doubt that there would be any field in which occasional practical exercises of an undoubted power would yield larger public returns, or that in any event there could be a case more justifying an exercise of that power than the present case, presenting as it does what the Department of Justice has very fairly denominated a "significant question."

The Court is respectfully referred for a further exposition of these factors to our petition for the writ.

PART TWO

AS TO THE MERITS.

I.

THE STRUCTURE OF THE STATUTE SHOWS A CONGRESSIONAL DETERMINATION TO ENTRUST TO THE FEDERAL TRADE COMMISSION AN EXCLUSIVE PRIMARY JURISDICTION OVER THE QUESTION WHETHER AGREEMENTS OR ACTS OF EXPORT TRADE ASSOCIATIONS ARE VIOLATIVE OF THE ANTITRUST LAWS.

The Webb-Pomerene Act differs from all of the other related statutes in this respect,—that its language embraces the entire structure of § 1 of the Sherman Act.

The statutory theory is that

(1) The Sherman Act confers upon the district courts jurisdiction of suits brought by the Attorney General to enjoin restraints of interstate and foreign trade, and confers upon the Attorney General the power to bring such suits. A principal function of the Sherman Act was to confer a jurisdiction which did not previously exist in the district court, at the suit of the Attorney General.

(2) The Webb-Pomerene Act then removed from the scope of the Sherman Act and of the Clayton Act the field of foreign commerce to the extent that it might be occupied by export trade associations and their agreements and acts. This removal applies both as to the substantive restraints and as to the procedural conferment of jurisdiction on the district courts at the suit of the Attorney General.

(3) To the exception which the Webb-Pomerene Act thus carved out of the jurisdiction conferred by the Sherman Act, there were annexed *provisos* limiting the immunity of the associations and of their acts and agreements. These provisos were four in number:

(i) That the association, agreement or act should not be in restraint of trade *within* the United States,

(restraint outside the United States indeed being the very reason for the enactment).

(ii) That the association, agreement or act should not be in restraint of the export trade of any domestic competitor of such Association.

(iii) That no act or agreement of the association should artificially or intentionally enhance or depress prices within the United States of the commodities of the class exported by such association,

(artificial and intentional enhancement or depression of prices outside of the United States being by necessary implication permitted).

(iv) That no act or agreement of the association should substantially lessen competition within the United States or otherwise restrain trade therein.

(i) and (iv) are the same in substance, and amount to a general proviso against restraint of trade within the United States. They follow either directly the language of the

Sherman Act, or indirectly the gloss that has been put upon the statute by the decisions of this Court,[4] or the gloss put upon the Sherman Act by the substantive provisions of the Clayton Act[5] and the Robinson-Patman Act of June 1936 (49 Stat. 1528, 15 U. S. C. § 13 (a)).

(ii) and (iii) are more specific provisos, both of which also flow naturally from the nature of the Webb-Pomerene Act. The purpose of the Act was to permit restraints of trade in foreign markets. Proviso (ii) forbids restraint of other Americans wishing to export, and proviso (iii) prevents artificial or intentional raising or depressing of prices within the United States.

The problem is as to what government agency or officer first administers the complex questions that arise out of this statute. That question is dealt with in §5 of the Webb-Pomerene Act (15 U. S. C. §65). In its first paragraph it spells out in detail the provisions for filing with the Federal Trade Commission of full data and information upon the export trade associations and their agreements and activities, and provides the penalties for their failure so to file. The definition of the subject-matters upon which in-

---

[4]For example, in *Paramount Famous Corporation* v. *United States*, 282 U. S. 30, the preservation of competition was stated to be the purpose of the Sherman Act. Compare the phrase in the Webb-Pomerene Act "substantially lessens competition".

[5]Characteristic language of the Clayton Act being "* * * where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce". (Act of October 15, 1914, ch. 323, § 7, 38 Stat. 731, 15 U. S. C. § 18. See also 15 U. S. C. § 13, § 13a, § 14).

formation is to be filed is a wide one, indicating the breadth of the Commission's jurisdiction, for it requires information

> "as to its organization, business, conduct, practices, management, *and relation to other associations, corporations, partnerships, and individuals.*"

The italicized portion is of particular materiality to our case.

The second paragraph of §5 (15 U. S. C. §65) follows in identical language the substantive §2 (15 U. S. C. §62) and entrusts to the Federal Trade Commission the entire complex question of delimitation between the general exemption provided by the statute and the four specific provisos. We have printed, *supra*, in parallel columns the language of the substantive section (§62) and of the second paragraph of the procedural section (§65), from which it will be seen that there is no question arising under the substantive section which is not by the procedural section entrusted to the jurisdiction of the Federal Trade Commission. Read together the two show an unquestioned Congressional intention that export trade associations and their acts and agreements should not be the subject-matter of independent prosecution by the Attorney General except after investigation and reference to the Attorney General by the Federal Trade Commission.

This conclusion is given emphasis by the fact that instead of merely omitting a conferment of jurisdiction upon the Attorney General, the procedural section of the Webb-Pomerene Act does expressly confer a certain, yet limited, jurisdiction upon him. There are two heads for such jurisdiction. Under the first paragraph of the procedural section, it becomes the duty of the Attorney General to direct

the District Attorneys in the collection of penalties and forfeitures for failure to provide the statutory information to the Federal Trade Commission. And in the second paragraph there is conferred upon the Attorney General the power to take such action as he may deem proper, but not until

(1) an alleged violation of law by the Association, or in consequence of its acts or agreements, which

(2) has been investigated by the Federal Trade Commission;

(3) recommendations have been made by the Commission;

(4) the Association has failed to comply therewith; and

(5) the Commission has referred its findings and recommendations to the Attorney General.

In this case we stand at the threshold of an inquiry into the question whether an export trade association, and its members and the parties with whom it makes its agreements, have so acted as to violate one or more of the provisos to the Webb-Pomerene Act.

But to overstep one or more of the provisos of the Webb-Pomerene Act is precisely the same as to violate the Sherman Act. This is so because the provisos to the Webb-Pomerene Act cover the whole field of the Sherman Act with respect to the domestic activities of export trade associations, their agreements and acts.

Such an inquiry is therefore within the jurisdiction entrusted to the Federal Trade Commission.

The Attorney General's position, on the other hand, is a simple one. "It is my duty to enforce the Sherman Act,"

he says: "These parties are violating the Sherman Act." We agree that this would be so if there were no other applicable Act of Congress since the Sherman Act. But the Webb-Pomerene Act is such an Act.

The Sherman Act is, we admit, an Act of *general* application. It covers the whole field of commerce. But obviously the Congress can make *specific* exceptions for specific fields of commerce. The Attorney General must admit that the Webb-Pomerene Act is a specific act, and that its specific subject-matter is

> Export Trade Associations.
> Their Agreements.
> Their Acts.

The Attorney General must also admit that the Congress has not merely (in a negative way) excepted this specific subject-matter from the application of the Sherman Act. The Congress has (in an affirmative way) continued this subject-matter under Federal control, but has entrusted that control in the first instance specifically to the Federal Trade Commission.

This is not therefore a question of repeal by implication at all. No *substantive* statute has been repealed. What has been done, has been to entrust a *procedural* power to a particular commission.

None of these points can possibly be disputed by the Attorney General. He must admit that, at least to some extent, the Federal Trade Commission has been given a jurisdiction from which he has been excluded. The undisputed extent of this jurisdiction is the field of activity of the Association, *and its acts and agreements in the course of export trade and commerce.*

The question that really arises is whether there is an implied exception in favor of the Attorney General so far as the provisos in the Webb-Pomerene Act are concerned.

The fact of economic life that gives rise to the difficulty is that all trade and commerce at least to some extent interrelates. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533; more specifically, that an association, even if formed for the primary purpose of export trade, may affect domestic trade; that the same is true not merely of its own acts, but of the agreements that it makes with others and the acts that it causes its members to engage in; that they may even amount to a deliberate attempt to violate otherwise applicable provisions of the Sherman Law.

All these possibilities we admit as economic realities. All these possibilities, we admit, are alleged by the government to have actually occurred in this case.

But the question remains: Who regulates them? (a) Is it the Attorney General because they would constitute violations of the Sherman Act? (b) Or is it the Federal Trade Commission because the Webb-Pomerene Act has expressly entrusted it with the power?

To this question the Attorney General will doubtless answer: "Both." He will doubtless say: "I do not dispute the conferment of jurisdiction by 15 U. S. C. § 65 on the Federal Trade Commission in this instance. What I do say, is that I have a concurrent jurisdiction."

So the question reduces itself to this: Does the Attorney General have a jurisdiction concurrent with and in addition to that of the Federal Trade Commission?

To this the answer is that the Congress has shown that it knows how to provide for concurrent jurisdiction when it

wishes to do so. Examples within the antitrust laws themselves are §§ 2, 3 and 7 of the Clayton Act. By § 11 (a procedural section) authority to enforce compliance was vested in various Federal commissions (as to railroads, in the Interstate Commerce Commission; as to radio, in the Federal Communications Commission; as to aviation, in the Civil Aeronautics Board; as to banks, in the Federal Reserve System; and otherwise, in the Federal Trade Commission). In each case, a full procedure was spelled out, with eventual jurisdiction in the Circuit Courts of Appeal to enforce at the suit of the appropriate commissions. There is no reference to the Attorney General in § 11. But independently, and in addition, it was expressly provided in § 15 of the Clayton Act that the several district courts were invested with jurisdiction over the same subject-matter, and that it should be the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to enforce it.

Here is a true case of concurrent jurisdiction, specifically conferred by statute—and in the same group of statutes with the Webb-Pomerene Act—*i.e.* in one of the antitrust Acts.

But if the Attorney General had some sort of inherent jurisdiction to enforce the antitrust Acts, it would have been unnecessary for the Congress to confer it upon him or upon the district courts in respect of the Clayton Act.

And the Clayton Act was enacted in 1914,—just 3 years before the Webb-Pomerene Act,—and in the same prevailing legislative atmosphere—the period of the Wilsonian "New Era". It cannot be said that the Congress did not, when debating and passing the Webb-Pomerene Act, have fully in mind the precedent of the Clayton Act.

Yet the Webb-Pomerene Act follows an entirely different theory from the Clayton Act. No general jurisdiction is conferred upon the Attorney General or the district courts. There is a specific conferment of jurisdiction on the Federal Trade Commission. But instead of providing that after the Federal Trade Commission has completed the investigation, it shall seek to enforce its order in the Circuit Courts of Appeal, the provision is that it shall, if it shall conclude that the law has been violated, and if the Association shall have failed to comply with its recommendations, refer its findings and recommendations to the Attorney General for such action as he shall deem proper.

Here is a *consecutive*, not a *concurrent*, jurisdiction. The Attorney General is assigned a specific role to be played by him at a specific time—when the Federal Trade Commission shall have acted.

Omission by the Congress of provisions in the Webb-Pomerene Act similar to sections 11 and 15 of the Clayton Act is expressive of an intention not to provide a concurrent jurisdiction. Nor would there be any reason for the Courts to adopt a rule that a construction of statutes is to be *favored* which gives *concurrent* jurisdiction to *two* bodies. Obviously, there must always be some extra burden in working under two or more agencies of the Federal Government instead of under one. If there be any rule of construction, therefore, it must surely be that that construction is to be favored which relieves the citizen of that *burden*, so long always as there does remain one Federal agency which has jurisdiction.

Expressed affirmatively, the true rule of judicial construction must be that the Congress will be presumed, in the absence of plain language to the contrary, to have in-

tended one Federal agency to have jurisdiction at a time. This rule not merely avoids the oppressions and burdens to which we have referred, but avoids the unseemly consequences of conflicts or races of diligence between two Government agencies acting simultaneously or competitively in the same field.

But we do not ask the Court to decide the case upon any rule of construction. We submit that the true course is an objective examination of the Webb-Pomerene Act.

We suggest that it is impossible to conceive a stronger set of statutory provisions to express the Congressional intention, except only that the statute might conceivably have gone on to say in so many words that the Attorney General shall *not* have jurisdiction until the Federal Trade Commission shall have acted. Thus, at the end, after the words

> "said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper",

the Congress might conceivably have added:

> "and he shall take no action on his own motion until he shall have had such findings and recommendations so referred to him".

But surely it would, to say the least, be a very curious rule that, whenever the Congress is passing an Act on a specific subject and conferring in that very Act a specific limited jurisdiction on the Attorney General, it must nonetheless be deemed to have conferred a conflicting or overriding additional and general jurisdiction on the Attorney General unless it has in so many words said the contrary.

In the Webb-Pomerene Act, the Congress went to the pains of laboriously repeating in the procedural sections, phrase by phrase,—yes, word by word,—all the words and phrases of the substantive section; and in the substantive section it went to the pains of laboriously repeating not merely the words of the substantive provision of the Sherman Act, but even the guiding phrases that had been supplied by this Court and by the Clayton Act in interpreting and clarifying the Sherman Act.

Having done as much, the Congress then spelled out with the utmost precision the designation of the enforcement agencies to whom the responsibility was entrusted; and the Congressional direction as to whether there ought to be any investigation of such charges so far as concerned Webb Act Associations, their acts and agreements, and if there were an investigation, what ought to be its results:

(1) "Whenever *the Federal Trade Commission shall* have reason to believe * * *,

(2) "*it shall* summon such association, its officers, and agents to appear before it,"

(3) "and thereafter *conduct* an investigation into the alleged violation of law.

(4) "Upon investigation, *if it shall* conclude that the law has been violated,

(5) "*it may* make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law.

(6) "If such association fails to comply with the recommendations of the Federal Trade Commission, *said commission shall* refer its findings and recom-

mendations to the Attorney-General of the United States.

(7) "for such action thereon as *he may* deem proper."

Could the Congress have done more?

We agree that the Sherman Act is an act "of general application", but it is equally fitting to recognize that there are a great number of special fields of economic activity to which the Congress may consider that a different, and more mature and modern, economic rule may be applicable. When the Congress has applied such a rule, it has not done so with any idea of "repealing" the Sherman Act, whether "by implication" or otherwise. It has done so for the purpose (1) of providing an exemption from the Sherman Act, and (2) of setting up a governmental administrative body to police the exempted field.

The Sherman Act constituted an incorporation within the Federal law of the old common law principles in favor of free trade. The substantive phrases of the Sherman Act—"restraint of trade", "monopolize or attempt to monopolize"—are so characteristically "of general application" that they provide a broad philosophy of economics. The prevailing political and economic trend since 1890 has been, while preserving that philosophy as the general rule, to recognize any number of specific fields to which a more specific rule is deemed to be appropriate. No longer persuasive are the arguments advanced by the Department of Justice in the Court below:

(1) That old statutes of general application which give effect to the principles of *laissez-faire* are to be

preferred to modern statutes of specific application to particular fields of industry and commerce.

(2) That the true rule of judicial construction is therefore to be that the old general statute is paramount to the new specific statute.

(3) That the way that the Court can accomplish this result will be to phrase its opinion as one to the effect that it finds in the new statute "no language expressly repealing" the old statute. (Govt. brief below, p. 10).

We cannot resist the conclusion that the Attorney General must rest in the end upon a theory that he has some sort of inherent power; alternatively expressed, that one rule is to be applied in deciding whether the rights of individuals to sue under the antitrust acts have been repealed by subsequent legislation and that a different rule is to be applied to the government. The short answer to this is again that when Congress wished a different rule to apply, it knew how to prescribe it. It did so in the proviso to § 16 of the Clayton Act, recently under review by this Court in *Georgia* v. *Pennsylvania Railroad Co., et al.*, where it provided that no person "except the United States" might bring suit in equity for injunctive relief against any common carrier subject to provisions of the Interstate Commerce Act in respect of any matter subject to the jurisdiction of the Interstate Commerce Commission.

In the absence of such a provision in the Webb-Pomerene Act, a decision in favor of the government in this case must necessarily be a decision that any individual person may bring a suit in equity to enjoin those very acts and agreements of Webb export trade associations which the

Congress supposed that it had entrusted to the exclusive primary jurisdiction of the Federal Trade Commission.

The Attorney General's argument thus necessarily strikes at the very roots of the primary jurisdiction doctrine. For the Court to establish a rule in respect of the Webb-Pomerene Act that would enable the Attorney General to sue without awaiting action by the Federal Trade Commission, while forbidding private individuals so to do, would be judicial legislation, and of the worst sort, for it would be judicial legislation in a field in which the Congress has evidenced its capacity (by § 16 of the Clayton Act) to enact its own legislation of just that character when it wished to do so. To avoid the curse of judge-made law, a decision by this Court in favor of the Attorney General in this case must necessarily be construed as a decision in favor of the right of any private person to bring a similar case. That would be to carve the Webb-Pomerene Act out of the application of the primary jurisdiction rule. But if that rule is to have any meaning, it must be a rule of general application. And so we have understood it to be. In effect, this Court has laid down that where there is an express grant of jurisdiction over a subject-matter to a particular federal administrative commission, resort must not be had to the Courts until the plaintiff can show that he has exhausted his administrative remedy.

It might be argued that § 16 of the Clayton Act was itself a dispensation from that rule, in favor of the Attorney General and private persons alike, in all cases other than Interstate Commerce Commission cases. And doubtless this was so, so far as the Sherman Act and the Clayton Act were concerned.

But the Clayton Act was enacted in 1914 and the Webb-Pomerene Act in 1918. § 16 of the Clayton Act was not applicable to the Webb-Pomerene Act, which was not included within the definition of "antitrust laws" in § 1 of the Clayton Act to which § 16 was to apply. The Webb-Pomerene Act makes no distinction between the Attorney General and private persons; and it follows that the primary jurisdiction doctrine must apply to the Webb-Pomerene Act without distinction as between them. If so, it excludes the Attorney General as well as the public.

II

THE DECIDED CASES IN OTHER FIELDS RECOGNIZE THE PRINCIPLES UNDER WHICH THE JURISDICTION OF THE FEDERAL TRADE COMMISSION MUST BE EXCLUSIVE IN THE FIELD ENTRUSTED TO IT BY THE CONGRESS.

The position of the Federal Trade Commission is different from that of any of the other government commissions, in that its dominant function is in the field of the antitrust laws themselves.

All of the other government commissions and bodies have particular limited fields entrusted to their care and guardianship—the national transportation system to the Interstate Commerce Commission; the agricultural interest to the Secretary of Agriculture; radio, telephone, telegraph and other communications to the Federal Communications Commission; coal to the Coal Commission; power to the Power Commission; securities and stock exchanges to the Securities and Exchange Commission; aircraft to the Civil Aeronautic Board; etc. In each field there remains to the

Department of Justice the responsibility of policing the provisions of the antitrust laws against conspiracies and monopolies.

The responsibility of the Federal Trade Commission for the field of export trade is analagous to these particular responsibilities of the other named commissions. But there is this vital difference with the Federal Trade Commission, —that it functions within the general framework of the antitrust laws. Like the antitrust division of the Department of Justice, it is charged, as no single one of the other commissions is charged, with responsibility for protection of antitrust policies *as such*.

The Federal Trade Commission is therefore in a position critically different for the purposes of this type of problem than that of any of the other commissions. On this solid and substantial ground the various decisions which have pricked out the boundary line between the particular functions of the other commissions, on the one hand, and the enforcement of the Sherman Act, on the other hand, become meaningless when sought to be applied to the Federal Trade Commission. The language of the opinions may remain an instructive guide, but only provided that it be constantly borne in mind that their problem was a different one.

It was in harmony with this distinction that the Congress itself drafted the Webb-Pomerene Act in terms so different from those of any of the other Commission acts. In none of the acts under which the various above-named commissions functioned, is there inserted language comparable to that found in the four provisos of the Webb-Pomerene Act and which serve to draw within the scope of that Act itself the broad field of the antitrust laws as such.

The statutes which have covered portions of the general field of the Sherman Act have taken many diverse forms. Indeed, no two have been just alike. The Sherman Act may be analogized to the full moon which in some cases has been covered only to a small extent by the particular statute, leaving its own field of operation nearly at the full, while in other cases the particular statute has covered to so great a degree that only a thin field of operation is left to the Sherman Act comparable to the new moon.

The primary jurisdiction doctrine establishes, that where the Sherman Act is covered, the essential findings must first be made by the particular commission to which Congress has entrusted jurisdiction over the particular Act. That the primary jurisdiction doctrine is operative against the Attorney General as well as against the public, is obvious on principle and is given authority by the actual decision upon that part of the indictment in *United States* v. *Pacific & Arctic Railway and Navigation Company*, 228 U. S. 87, in respect of acts covered by the Interstate Commerce Act.

The problem in any such litigation instituted by the Attorney General under the Sherman Act is to determine whether the subject-matter of the particular case is within that portion of the field of the Sherman Act which has been covered by some particular Act or is outside of it.

In our case, the action is in equity, is under § 1 of the Sherman Act, and relates to alleged agreements made and acts done, in every single instance by the export trade association itself,—either alone, or together with the other defendants. In no single instance alleged in the complaint was the association not a participant. Indeed, the case is a strong one, because in every instance the complaint attributes leadership to the association.

Accordingly, in our case, the primary facts that arise for determination are whether the particular agreement or act was

(i) "done in the course of export trade";

(ii) "not in restraint of trade within the United States";

(iii) "not in restraint of the export trade of any domestic competitor of such Association";

(iv) not an "understanding, agreement, or conspiracy, or * * * act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association"; and

(v) not an "agreement, understanding, or conspiracy, or * * * act which substantially lessens competition within the United States or otherwise restrains trade therein."

The first is distinctive of export trade, and defines as it were the particular field entrusted by the Webb-Pomerene Act to the Federal Trade Commission, in a manner comparable to the delegations of power in other fields to other commissions (e.g. transportation to the Interstate Commerce Commission).

The last four (which we have heretofore referred to as the four "provisos") are entirely different. They do not identify the particular field, but they cover the general field of §1 of the Sherman Act. That section covers, and covers only, a

> "contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States or with foreign nations."

We do not therefore have need in this case to appeal to the doctrine in *Central Transfer Company* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469, for although it would be particularly difficult under this complaint to separate an injunction designed to put an end to the conspiracy from an injunction that would affect acts within the jurisdiction of the Federal Trade Commission, there is no occasion to do so, as the present statute entrusts the problem as to the conspiracy itself to the Commission.

The dual function of the Federal Trade Commission—relating to the preservation of antitrust policy generally and to the supervision of export trade particularly, is illustrated by sub-paragraphs (d) and (h) of § 6 of the Federal Trade Commission Act (Act of Sept. 26, 1914, c. 311, 38 Stat. 717, 15 U. S. C. § 46) empowering the Commission

> "(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation."

> "(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

These provisions underline the view that the Commission's functions (a) relate broadly to "any" alleged violations of

the antitrust acts, and (b) relate particularly to foreign trade.

We now come to distinguish the case upon which the government placed its principal reliance below and which was the basis of the opinion of the learned District Judge. *United States* v. *Borden Company*, 308 U. S. 188. We will review the case in further detail below, with particular identification of the defendants, but for the present, it will be more helpful to confine our attention to the important question in the case directly material here. This is the question as to whether the statutes which had particular application in that case are comparable to the Webb-Pomerene Act. The *Borden* case was a criminal prosecution by the government for alleged violation of §1 of the Sherman Act. The primary jurisdiction question was raised by demurrer based upon two statutes,—the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 608b) and the Capper-Volstead Act (42 Stat. 388, 7 U. S. C. 291). The Agricultural Marketing Agreement Act was plainly of very limited application,[6] and the important question arose under the Capper-Volstead Act.

[6] "The provisions of the Agricultural Marketing Agreement Act in no way covered the field of the Sherman Act. It made reference only to particular transactions, which although illegal under the Sherman Act, might be legalized by official participation and authorization by the Secretary of Agriculture. Under that Act, agreements were illegal unless approved in advance by the Secretary. Under the Webb Act all export associations are exempted from the Sherman Act until affirmative action is taken by the Federal Trade Commission. In the one case, affirmative action is required as a condition precedent to removing an agreement from the Sherman Act; in the other, affirmative action is required as a condition precedent to making the Sherman Act applicable to the agreement."

(a) The Capper-Volstead Act provides for the formation of agricultural associations. To that extent it is closely comparable to the Webb-Pomerene Act. (b) It does not contain an express provision for exemption from the antitrust laws. It there departs from the Webb-Pomerene Act. (c) Like the Webb-Pomerene Act, it contains a proviso against antitrust violation. (d) But unlike the Webb-Pomerene Act, this is strictly limited, the Capper-Volstead Act saying that:

> "If the Secretary of Agriculture shall have reason to believe that any association monopolizes or restrains trade in interstate or foreign commerce *to such an extent that the price of any agricultural product is unduly enhanced by reason thereof*, he shall serve upon such an association a complaint * * * "

Reference to the italicized portion will show that this provision is limited to one-half of one of the four provisos of the Webb-Pomerene Act (viz. the third, identified last above as item iv). That is, where "the price * * * is enhanced." This did not apply to restraints of trade generally, or even to those restraints which have the effect of depressing prices or have the intent even, without the effect, of enhancing them.

The procedural provision of the Capper-Volstead Act was that if the Secretary should be of opinion that the Association did monopolize or restrain trade to such an extent that the price of a product was unduly enhanced thereby, he was to issue a cease and desist order. Upon request of the respondent Association or in the event of its failure or neglect to obey such order, the Secretary was to file the record in the District Court and to give notice to the At-

torney-General of the filing, whereupon the District Court was to have jurisdiction to affirm, modify, or set aside the order. No reference was made either to criminal proceedings or to any wider civil jurisdiction in the District Court.

Summarizing the comparisons between the Capper-Volstead Act and the Webb-Pomerene Act, and following in sequence the factors that received attention in the opinion of this Court in the *Borden* case, 308 U. S. at p. 206:

First, the Capper-Volstead Act contained no criminal provision at all; and *United States* v. *Borden* was a criminal proceeding. The Webb-Pomerene Act on the other hand shows that Congress expressly directed its attention to criminal proceedings, for the concluding sentence of the procedural § 5 is that:

> "If such Association fails to comply with the recommendations of the Federal Trade Commission, said Commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

Two points are to be noted: (1) Criminal proceedings are to be undertaken only if the Association fails to comply with the recommendations of the Commission, but (2) the Attorney General is then to have full discretion as to the conduct of the proceedings ("such action thereon as he may deem proper").

At first blush, it may appear surprising that the Webb-Pomerene Act has eliminated criminal proceedings in the absence of the happening of the condition that the association fails to comply with the recommendations of the Commission. But the surprise is removed when one bears in

mind that the scheme of the statute was that the Commission was to have a regular, continuing and close supervision of all of the affairs of all associations.[7] Indeed, no association existed at the time of the statute, and there were therefore no prior violations in respect of which any immunity was given by the statute. All associations were to be subsequently created and under the direct supervision and control, both as to their creation and throughout their lives, by the Commission. It is not surprising that the Congress did not contemplate that under these conditions there was important need for a criminal jurisdiction, except in cases in which the Commission should make the recommendation contemplated by statute "for the readjustment [of an association's business], in order that it may thereafter maintain its organization and management and conduct its business in accordance with law," and the association should then be obdurate and refuse to comply therewith. In such a case, the Commission was directed to withdraw its fostering guardianship from the association and to turn the whole matter over to the Attorney General ("shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper").

---

[7] The intent of the Congress both that the supervision of the Commission shall be close and continuous, and that the statute should itself provide for penalties in such instances as the Congress deemed appropriate to its scheme of regulation, are both evidenced by the further provision in § 5 that upon failure by an association to furnish to the Commission such information as the Commission might require, the Association should "forfeit to the United States the sum of $100 for each and every day of the continuance of such failure."

The considerations that moved this Court in *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 107-8, are applicable here: that the statute

> "* * * is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission * * *. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal."

That decision (by a unanimous Court) was a recent one when the Webb-Pomerene Act was under consideration in the Congress.

Second, the Webb-Pomerene Act, unlike the Capper-Volstead Act, gives express immunity from the Sherman Act. The substantive § 2 of the Webb-Pomerene Act opens with this expression of immunity, as obviously the governing reason for its enactment.

Third, the Webb-Pomerene Act, as we have already noted, covers the whole domestic field of § 1 of the Sherman Act, instead of a limited portion thereof. The Webb-Pomerene Act does not directly cover § 2 of the Sherman Act at all. In our view, that is because such coverage was unnecessary, as monopolization or attempt to monopolize could not occur without at the same time there being an attempt to restrain trade, on the principle that the greater includes the less. But the point is without moment, as a construction of the Webb-Pomerene Act as eliminating

from its purview § 2 of the Sherman Act would simply mean that the Attorney General is left free to institute exclusively § 2 proceedings in respect of export trade associations, their acts and agreements. The present case includes § 1; indeed, it is brought only under § 1.

Recent opinions for this Court have fully reviewed the generally governing principles, and we now will refer briefly to them. *Georgia* v. *Pennsylvania Railroad Co.*, No. 11 Orig. Oct. Term 1944. *McLean Trucking Company* v. *United States*, 321 U. S. 67.

In *Georgia* v. *Pennsylvania R.R. Co.* (slip opinion at p. 11), the Court had occasion to point out that a commission had been given express jurisdiction over a portion of the characteristic Sherman Act territory (mergers and consolidations):

> "* * * Congress by § 11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of its provisions 'where applicable to common carriers' under the Commission's jurisdiction. It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25-26) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put

> an end to their activities. * * * Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. * * *"

The Court divided upon the question whether the Commission had under the particular statutory scheme primary jurisdiction to afford adequate relief against an alleged rate fixing combination, but there was no dispute that the statute might have so provided.

Mr. Justice Douglas's opinion is entirely consistent with the principles which we are submitting (slip opinion at pp. 11-12):

> "* * * Regulated industries are not *per se* exempt from the Sherman Act. *United States* v. *Borden Co.*, 308 U. S. 188, 198 *et seq.* * * * Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *United States* v. *Borden, supra*, pp. 198, 199."

Our submission is that there is in our case a clear repugnancy, at least *pro tanto* to the full extent of § 1 of the Sherman Act as it bears upon agreements and acts with and of an export trade association, upon which alone this case is sought to be grounded.

In this case the trade-restraining power that is alleged to exist "under the aegis of private parties" (compare *Georgia* v. *Pa. R. R. Co.*, slip op. p. 14), is alleged to exist under the aegis of the Alkali Export Association, Inc., which is a body formed under "Congressional sanction" and with "Government supervision and control", so that the present bill is seeking "to have the Court act in the place of the commission" (compare *id.*). An injunction in this case would run the risk of conflicting with what "the commission might later approve or condone", and thus

"trench on the domain of the Commission" (compare *id.* at p. 15).

Turning to the *McLean Trucking Case*, 321 U. S. 67, it is again illuminating to set against the present case the factors to which the Court directed attention in that case. It is notable that the Congress in the Webb-Pomerene Act was dealing with a similar problem of accommodation of conflicting policies (*id.* 79). The issues as to foreign and domestic commerce were again intertwined (*id.* 77). In that posture the Congress sought the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, and to that end vested an expert administrative body with broad discretion and charged it with the duty to execute stated and specific statutory policies (*id.* 79). It did not empower the Commission to enforce the Sherman Act as such (*id.* 79), but it did carefully provide that after the Commission should have exercised its functions in respect of export trade, the duty of enforcement of the Sherman Act should be referred by the Commission to the Attorney General.

Before 1918 the effort of Congress in the field of foreign commerce, as in the field of domestic commerce, had been directed mainly to the prevention of abuses, and emphasis of the preservation of free competition was part of that effort (*id.* 80-81). The Webb-Pomerene Act added a new and important object to previous foreign commerce legislation, seeking affirmatively to build up a system of export trade associations prepared to handle promptly their share of the foreign commerce of the country (*id.* 81). To that end the policies of the anti-trust laws were to determine the public interest only in a qualified way (*id.* 83). There was an altered emphasis on achieving an adequate,

sufficient and economic system of foreign trade through close supervision of business operations and practices rather than through heavy reliance on the enforcements of free competition (*id.* 83). The origins and legislative history of the Webb-Pomerene Act adequately disclose, as we have pointed out, that in it the Congress recognized there may be occasions when competition in export trade may result in harm to the public as well as in benefit and that when the export inflicts injury upon its rival, it may be the public that ultimately bears the loss (*id.* 83-84).

The Congress was informed that its policy would be furthered by encouraging the organization of stronger units for export (*id.* 85). It in terms relieved participants from the requirements of the antitrust laws and in doing so presumably took into account the facts that the business affected would be subject to the strict regulation of the designated commission (*id.* 85).

In one vital aspect, however, the Webb-Pomerene Act differs from the Motor Carrier Act of 1935. The Motor Carrier Act did not import the general policies of the antitrust laws as a measure of permissibility of the mergers authorized by it (*id.* 85). The Webb-Pomerene Act, on the other hand, imported all the general policies of the antitrust laws, so far as domestic commerce was concerned, within the very framework of the regulation of foreign trade entrusted by it to the Commission. It therefore did what the Motor Carrier Act did not do,—displaced the ordinary function of the Department of Justice and entrusted it in the first instance to the exclusive jurisdiction of the Federal Trade Commission. In other words, all of the factors which favored the sustaining of the position of the Interstate Commerce Commission in the *McLean* case

are present in this case; and there is added to them the further consideration that the Congress showed its faith that the Federal Trade Commission should consider both the particular economic field entrusted to its fostering guardianship (that of export trade) and the *relation* of that field to the other field in which the principles of the antitrust laws were to remain operative.

III

THE INTENT OF THE CONGRESS TO THAT EFFECT FINDS SUPPORT IN THE CIRCUMSTANCES OF THE TIME AND WAS CLEARLY EXPRESSED IN THE DEBATES.

(a)

The surrounding circumstances when the Act was passed.

The action of the Congress in passing the Webb-Pomerene Act must be viewed in the framework of the times when it was passed: The statute was passed during the Winter of 1917-1918, before the campaign that ended the First World War, and at a time when the country was considering the legislative framework in which the anticipated post-war trade should be conducted. Indeed, such problems were remarkably similar to those of today. Thus, specific reference is made in the debates to the prospective competitive power of Great Britain and Germany in post-war markets (*e.g.* Cong. Rec., Vol. 55, Part 3, p. 2785; Vol. 56, Part 4, pp. 3564-3565).

No one could foresee whether co-operation or competition would be the wiser course, and in any event no one could foresee how the rules of the game would work themselves out in practice as applied to the hundreds of separate industries in the country.

What the Congress did conclude, was that this was not an appropriate field for regulation by the sledgehammer method of anti-trust enforcement actions brought by the Attorney General in the District Courts. The Congress was already familiar with the fact that actions of that character are not the most expeditious method as yet designed by man for regulating trade problems. It is true that there had not yet been an *Aluminum* case in which it would require a year in open court for the government's direct case. But there had been the *Standard Oil* and *Tobacco* cases, the total course of which had taken many years; and there was then dragging through the Courts the *Steel* case, which had six years of progress behind it, and (although perhaps the Congress could not exactly predict this) had three more years ahead of it.

But all that we need say is that Congress was entitled to conclude that the institution by the Attorney General of mighty antitrust litigations in the equity courts would not be the best way to regulate the post-war foreign trade of the United States.

An appropriate expression to this effect is found in the remarks of Senator Kellogg, when presenting the Capper-Volstead Act to the Senate in 1922 (Cong. Rec., Vol. 62, Part 2, p. 2050):

> "Mr. President, one of the objections to the Sherman law as applied to these cooperative associations is that any district attorney can go into court and get them indicted, and get them indicted upon a state of facts many times which I defy any lawyer to prove constitutes a monopoly. I spent some years in enforcing the Sherman Antitrust Act, and in some cases, after three or four years of litigation, the Supreme Court, by a divided court, held them illegal, and in other cases, by a divided court,

held them legal, and the farmer is unable to tell, until he reaches the end of an expensive litigation, whether he is breaking the law or not."

In the same speech Senator Kellogg said (at p. 2051):

> "Because the Sherman Act was passed a great many years ago and has done much good is no reason why, as conditions change and we progress in commerce and production, it should not be changed in some respect."

In taking the position that the Congress cannot exclude the Attorney General from activity in any particular field unless it bars him explicity and in so many words, the Department of Justice must be invoking a presumption that the Congress regards litigation in equity as the presumptively right way of enforcing its laws. This may have been Lord Eldon's view. But there has been nothing to indicate that the Congress of the United States has, at least in the current generation, evidenced the same passion for the merits of chancery litigation. It would not be too much to say that of all the modes of administering great commercial affairs that were more familiar to the last generation than to the present, none has suffered more widespread condemnation than the federal suit in equity.

Even stronger, we submit, are the arguments against the use of courts of equity for the administration of *international* trade.

That foreign commerce is an especially appropriate field for the exercise of administrative rather than judicial power, has long been recognized by this Court. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434; *Board of Trustees* v. *United States*, 289 U. S. 48, 57; *The Abby Dodge*, 223 U. S. 166, 176, 177; *Brolan* v. *United*

States, 236 U. S. 216, 218, 222; *Weber* v. *Freed*, 239 U. S. 325, 329, 330; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492.

The Webb-Pomerene Act was passed in 1918 to fill a vital need in that very field, and almost immediately great numbers of trade associations came into existence under the Act. (*Cf.* Final Report of the Executive Secretary to the T. N. E. C., Senate Committee Print, 77th Cong., 1st Sess., p. 101.) From the first, many of the associations engaged in activities of the character under investigation here; yet the Department of Justice never asserted jurisdiction,—and that means not merely during previous administrations, but during the first ten years of the present administration. Such a history is not of course determinative; but it is notable.

(b)

The Congressional Debates and Committee Reports.

The Webb-Pomerene Act was adopted by Congress in April 1918, following a comprehensive report, entitled "Cooperation in American Export Trade", by the Federal Trade Commission in May 1916. The Report said (p. 9):

> "Two chief dangers from cooperative export organizations of American manufacturers and producers are apparent. They may be used to exploit the home market and they may be used unfairly against individual American exporters. These dangers must be faced frankly and provided against fully.
>
> "The Commission is confident that this can be done without sacrificing the essential advantages of joint action and without altering the policy of the antitrust laws or interfering with their enforcement.

> "The only danger to the American consumer would arise if export combinations were to restrain trade in the domestic market. In order to make it difficult for export combinations even to attempt restraint of trade in the United States, the right to cooperate or combine should be limited to the export trade solely, *and administrative supervision should be provided to insure that such organizations are not used surreptitiously for restraining trade at home.* Such provisions of law, with the rigid enforcement of the antitrust acts, will guarantee competitive prices in the domestic market."[8]

Throughout the legislative history of the Webb-Pomerene Act it is evident that Congress intended that such "administrative supervision" should be entrusted to the Federal Trade Commission. It took almost two years after the Commission had submitted its report to Congress for the Webb-Pomerene Act to become law. House Report No. 50 (65th Cong., 1st Sess.), however, accompanying H. R. 2316 which eventually became the Webb-Pomerene Act, pointed out that:

> "A bill similar to this (H. R. 17350) was considered and favorably reported to the House by the Committee on the Judiciary during the Sixty-fourth Congress. It was debated, amended, and passed by the House on September 2, 1916, by a vote of 199 to 25.
>
> "It was then considered in the Senate by the Committee on Interstate Commerce and was favorably reported with amendments to the Senate by that committee on February 15, 1917, but failed to

[8] Italics throughout this brief are supplied unless otherwise indicated.

come to a vote in that body on account of the rush of other business during the closing days of the session.

"Nothing has occurred since the House debated and passed the bill during the last Congress to lessen the necessity of this legislation. Since that time it has received the specific indorsement of President Wilson in his annual address to Congress December 5, 1916."

The relevant paragraph of President Wilson's Address to the Congress (Cong. Rec., Vol. 54, Part 1, pp. 31, 32) was:

"I shall not argue at length the desirability of giving a freer hand in the matter of combined and concerted effort to those who shall undertake *the essential enterprise of building up our export trade*. That enterprise will presently, will immediately assume, has indeed already assumed, a magnitude unprecedented in our experience. We have not the necessary instrumentalities for its prosecution; it is deemed to be doubtful whether they could be created upon an adequate scale under our present laws. *We should clear away all legal obstacles* and create a basis of undoubted law for it which will give freedom without permitting unregulated license. The thing must be done now, because the opportunity is here and may escape us if we hesitate or delay."

The next to last sentence, about clearing away "legal obstacles" and making the law "undoubted", upon the basis of a system of licensing, indicates that the President at least believed that the ordinary judicial processes would not be appropriate to the regulation of export trade, but that it should be put in the hands of a Federal regulatory commission.

A Senate Report (No. 1050, 64th Cong., 2nd Sess.) on H. R. 17350 also made plain that it was intended that the Federal Trade Commission should have exclusive primary jurisdiction to initiate inquiry into the propriety of monopolistic activities of Export Trade Associations. The Report specifically stated (pp. 3-4):

> "Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States, which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, *so that they may determine* whether and to what extent the laws have been violated. For this reason the committee suggests the amendment at the close of section 5, which reads as follows:
>
> > "Wherever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally and unduly enhances prices within the United States of commodities of the class exported by such association, it shall summon such association, its officers, and agents to appear before it and thereafter conduct an investigation into the alleged

violations of law. Upon investigation, if it shall conclude that the law has been violated it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fail to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

"For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.'

"This amendment confers upon the Federal Trade Commission full power to investigate and the right to make recommendations to the associations for the readjustment of their business if any law has been violated so that they may thereafter maintain their organization and management and conduct their business in accordance with the law. If the association fails to do so, then the commission is directed to refer its findings and recommendations to the Attorney General for such action as he may deem proper."

The Senate Reports to the 65th Congress, which adopted the Act, were substantially to the same effect (Sen. Reps. 9 and 109, 65th Cong., 1st Sess.).

The debates on the Webb-Pomerene Act also demonstrate that Congress intended that the Federal Trade Com-

mission should have exclusive primary jurisdiction over the Associations. Thus the House of Representatives was advised by Mr. Graham, a member of the Judiciary Committee which recommended adoption of the legislation (Cong. Rec. Vol. 55, Part 4, p. 3570):

> "The bill is intended to enable half a dozen or more men engaged in the same line of business to organize an agency that will handle their product intended for export trade, to be used in that trade alone, and can not in any wise affect the question of prices in this country; and if it does and becomes an element in restraint of trade here or destructive to competition, the saving clauses of the bill will bring the corporation or association offending *under the control of the Federal Commission*, which can dictate the terms by which its business shall be perfected and made unobjectionable; and in case of failure of the corporation to observe those rules, then the offending association is turned over to the Attorney General."

The debates in the Senate are particularly enlightening on the precise issue presented in this case. Senator Pomerene, co-author of the Act, stated in response to a question by Senator Norris (Cong. Rec., Vol. 55, Part 3, p. 2786):

> "Mr. NORRIS. I wish to ask the Senator several questions in regard to the bill. First, will not the effect of the passage of the bill be that what would be illegal, even a crime, if committed with regard to domestic commerce and against our own people at home, would not be illegal if the same thing were done in foreign commerce against foreigners?
>
> "Mr. POMERENE. Mr. President, I think that point has been covered by our Supreme Court. I

do not have before me now the case, but it was in a case involving a contract with respect to bananas, as I remember it, in which it was held that the criminal provisions of the Sherman law did not apply to a contract made with respect to the sale of bananas in foreign countries.

"In further explanation of what the Senator evidently has in mind I refer him to section 4 and the latter part of section 5. I call his attention especially to the last two paragraphs of section 5, *which confer upon the Federal Trade Commission full power over any agreements, transactions, or acts of any of these associations in the foreign trade, and if the commission should find that their agreements, acts, or transactions are violative of the provisions of this bill or, for that matter, of any of our antitrust laws, it can make recommendations for the readjustment of their business, and if they fail to comply with them to make report of their findings and recommendations to the Department of Justice, for their action thereon.*"

At another point, Senator Pomerene said (Cong. Rec., Vol. 55, Part 3, p. 2788):

"Mr. POMERENE. One moment, please, and then I will yield to the Senator from Minnesota—that I think if the Senator from Massachusetts had given some thought to the formulation of a rule which would permit the advocates of this measure to do what it is sought to do, and at the same time make it perfectly clear so as to meet all contingencies, he would realize the task which confronted the committee. *It must be borne in mind that all these agreements, all these acts, all these associations, are under the supervision of the Federal Trade Commission, and that they will be acting as an advisory board in*

the same capacity they now act in our domestic commerce with reference to the evil of unfair competition.

"I dare say that we can cite concrete cases which the Senator and I would at once agree were unfair competition; but it would be utterly impossible for us, and it has been impossible for any lawyer or any court, to give a comprehensive definition of 'unfair competition' which is going to meet every contingency that may arise. *Our thought was that, if we could frame this bill in such a way as to show the real purpose, the general purpose, with respect to foreign trade, the Federal Trade Commission could be trusted to apply it to cases arising in practice.*

"MR. WEEKS. Mr. President, assuming that we are willing to do that and that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?

"Mr. POMERENE. It might do that.

"Mr. KELLOGG Mr. President——

"Mr. POMERENE. But, if the Senator from Minnesota will permit me, if it related to the foreign trade—and that is the purpose of this bill—I think it is pretty clear, at least it is clear to my own mind, that *the criminal penalties under the Sherman antitrust law would not apply to these foreign contracts or associations.*"

In the light of this statement of the Senator's, it must be apparent that all that he meant when he said "it might do that" was that the Department of Justice might bring a proceeding wrongly and without authority (just as we argued that it has done). That this was what he had in

mind is shown not merely by the above-quoted conclusion of his remarks, but by the context of the question that was put to him by Senator Weeks: assuming that Congress takes a certain view and the Commission agrees, what assurance has the Commission that the Department of Justice will not take a different view?

Senator Pomerene also stated (Cong. Rec., Vol. 55, Part 7, p. 7326):

> "It is to a desire to set aside these doubts, to give a certain amount of reassurance to those who are seeking foreign trade, that we owe the origin of this bill. I think that when the Senator carefully reads the bill he will find that we have not in anywise affected the operation of the Sherman law, so far as it relates to intraterritorial or domestic business. It seeks only to make it perfectly clear that these associations may be organized for the sole purpose of our foreign trade. Beyond that we do not care to go; and then *we have provided particularly that all the operations of these associations shall be subject to the jurisdiction and control of the Federal Trade Commission;* and if in anywise they may be interfering with what may be regarded as fair competition, or if they may be violating the laws of the land—trust laws or others—*then the Federal Trade Commission can investigate and make orders respecting the conduct of their business; and if they fail to comply with these orders, then these matters may be certified over to the Department of Justice for such action as they may think proper.*"

Senator Kellogg, another advocate of the Act in the Senate, expressly covered the issue involved in the present case in his following remarks (Cong. Rec., Vol. 56, Part 1, p. 111):

"So the bill not only protects the competitor in the export trade, *but it gives the Federal Trade Commission jurisdiction over the entire subject.* It provides that—

> "Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally and unduly enhances or depresses prices within the United States of commodities of the class exported by such association, it shall summon such association, its officers—

"And so forth, and gives the Federal Trade Commission power to remedy the evil."

Senator Pomerene also had occasion to say (Cong. Rec., Vol. 56, Part 1, p. 199):

"Mr. POMERENE. Mr. President, the Senator from Iowa has several times made the statement that it was the intention of this bill to repeal the Sherman antitrust law in so far as it applies to our foreign trade. I submit to the Senator that that overstates the purpose of the bill. *We are very careful in this bill to provide that where restraint is due to unfair methods of competition they will be subject to control by the Federal Trade Commission, and also they have the power after investigation to refer these matters to the Department of Justice for such action as that department may deem proper.*

It is true it authorizes combination and associations, and to that extent it does repeal the act, but it does not permit the use of any unfair method of competition in the way of interfering with the foreign trade."

Finally, Senator Pomerene concluded (Cong. Rec., Vol. 56, Part 1, p. 170):

"So that, I conclude from the principle laid down in this case, although an association organized under the pending bill should enter into some agreement or perform some act in a foreign country which met the requirements of law there, if at the same time the effect of it were such as to materially interfere with the policy of the United States under its trust laws, then it would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice.

"These associations are placed under vigorous supervision by the departments. In section 5 of the law they are required to register annually with the Federal Trade Commission, giving, among other things, their location, the names of the companies and corporations or individuals or partnerships that may be interested in them, the kind of business they are doing, copies of their charters, if any, or their articles of agreement forming the association; and later on, if the Federal Trade Commission at any time has reason to believe that they are violating any of the laws of the land, the commission can compel them to bring before them all of their books, all of their contracts, and everything pertaining to their business for their investigation; and it is made the duty of the Department of Justice, as well as the United States district attorneys, to see to the enforcement of this law.

"These associations, as shown in section 2 of the bill, must not be in restraint of trade within the United States or of the trade of a domestic exporter, and their acts must not be such as to artificially or intentionally and unduly enhance or increase prices. *If they do any of these acts or enter into any of these agreements, then the Federal Trade Commission has the right to inquire concerning them and to make recommendations requiring these associations to conform their business to the requirements of the statute. If they fail to do it, then the proceedings shall be certified over to the Department of Justice for such action as it may deem proper.* * * *"

No member in either the Senate or the House took issue with the foregoing observations as to the respective jurisdictions of the Federal Trade Commission and the Department of Justice. The Congress thus plainly recognized that the Federal Trade Commission had the expert knowledge necessary to administer the Webb-Pomerene Act properly. All were agreed (1) that the provisos would suffice to keep the substantive provisions of the Sherman Act in full force and effect for the protection of domestic trade and American exporters, but (2) that the policy of enforcing such substantive provisions against Export Trade Associations would be in the hands of an administrative agency and that Court proceedings were only to be resorted to after that agency had sent the case over to the Attorney General.

This has also been the interpretation by the Department of Commerce. In the pamphlet issued in November 1935 by the Department of Commerce (Bureau of Foreign and Domestic Commerce) entitled "The Export Trade Act", the following appears at page 1:

"Although there are restrictions in the Act which may seem burdensome, these were placed there to safeguard our traditional policy of open competition in industry.

"If upon investigation by the Federal Trade Commission of an act of an export association it is deemed to be a violation of the law, the offender is not penalized but reminded of the fact and directed to amend its ways. Only upon failure to comply with the recommendations of the Commission will the matter be brought to the attention of and for action by the Attorney General."

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

LELAND HAZARD
DAVID A. REED
CALVIN A. CAMPBELL
ROBERT T. MCCRACKEN
E. C. LEWIS
RALPH S. HARRIS
WILLIAM E. SIMS
H. G. HITCHCOCK
H. WEBSTER STULL
J. E. F. WOOD
F. C. LOWTHORP
BRUCE BROMLEY
GEORGE S. COLLINS
JOHN LOGAN O'DONNELL

Of Counsel in No. 1016

WM. DWIGHT WHITNEY
Counsel for Petitioners in No. 1016,
15 Broad Street,
New York, N. Y.

C. W. HOBSON
EDWARD D. LYMAN
JOHN L. REITH
WILLARD P. SCOTT

Of Counsel in No. 1017

FRED N. OLIVER
Counsel for Petitioners in No. 1017,
110 East 42d Street,
New York, N. Y.

April 4, 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 1 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION, *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

LELAND HAZARD
DAVID A. REED
CALVIN A. CAMPBELL
ROBERT T. MCCRACKEN
E. C. LEWIS
RALPH S. HARRIS
WILLIAM E. SIMS
H. G. HITCHCOCK
H. WEBSTER STULL
J. F. F. WOOD
F. C. LOWTHORP
BRUCE BROMLEY
GEORGE S. COLLINS
JOHN LOGAN O'DONNELL

Of Counsel in No. 1016

WM. DWIGHT WHITNEY
Counsel for Petitioners in No. 1016,
15 Broad Street,
New York, N. Y.

C. W. HOBSON
EDWARD D. LYMAN
JOHN L. REITH
WILLARD P. SCOTT

Of Counsel in No. 1017

FRED N. OLIVER
Counsel for Petitioners in No. 1017,
110 East 42d Street,
New York, N. Y.

May 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, *et al.*, *Petitioners*, *against* UNITED STATES OF AMERICA, *Respondent.*	No. 1016
CALIFORNIA ALKALI EXPORT ASSOCIATION, *et al.*, *Petitioners*, *against* UNITED STATES OF AMERICA, *Respondent.*	No. 1017

REPLY BRIEF FOR PETITIONERS

The government brief is in agreement with our own on so many points that the issue, although important, is brought within a narrow range.

That issue is whether the Webb-Pomerene Act brings into play the principle that where a subject-matter has been entrusted to a Commission, jurisdiction to litigate in the Courts is ousted until the Commission shall have acted.

The problem is one of statutory interpretation.

It is not the problem of examining the statute to see whether it explicitly ousts jurisdiction of the Courts or

repeals some earlier statute. The rule of primary and exclusive jurisdiction in administrative bodies has never depended upon express provision therefor in the statute. It is a rule which this Court has fashioned to give full effect to the presumed intent of Congress. *Myers* v. *Bethlehem Steel Corporation*, 303 U. S. 41. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125.

The problem of statutory interpretation is whether the particular statute has in fact entrusted the problem in question to the jurisdiction, supervision and control of a Commission. The Courts then supply the supporting rule that they will not entertain jurisdiction over the same problem until the Commission shall first have acted.

A number of the arguments suggested by the government are beside the mark. Thus, it can make no difference that the Commission has other functions of investigatory and advisory nature, or other functions in respect of which an appeal to the Courts is expressly provided upon a different principle (that the findings of the Commission if supported by evidence shall be conclusive and that the appeal shall be one of law), or that the Congress had made a different provision for supervision of this particular field during the twenty years prior to the passage of the Webb-Pomerene Act, or that this becomes one of the cases in which the Attorney General takes his action after one of the executive agencies of the government has acted rather than of his own motion, or that when he does act the Attorney General is left free to determine the manner of his action.

These arguments have validity only if it can be said that the meaning of a statute can be disregarded when its effect would otherwise be to change a law theretofore ex-

isting. Such an argument carries its refutation on its face. The Congress is free to fashion the appropriate statute for each need.

The one element that appears to us to be missing in the government brief is the one element which we submit should be determinative, viz. a careful examination of the statute as an entirety and an objective effort to apply its terms. As we went into such an analysis at length in our original brief, we need not repeat it here. It leads inescapably to the conclusion that the Congress carefully framed a statute covering the whole substantive field of § 1 of the Sherman Act, and then with equal care added precise provisions to insure that the whole field should be under the jurisdiction and control of the Commission, with provision for reference to the Attorney General *after* the Commission should have acted. Thus construed, the statute is a perfectly normal exercise of a Federal power, particularly where the power is directed to foreign commerce, with a collateral effect upon domestic commerce. It is the normal governmental procedure of entrusting supervision and control to one of the agencies of the government, and then providing for a reference by that agency (when the agency itself should see fit) to the Attorney General to perform his normal function of law enforcement.

It is not repugnant to our form of government to provide that the Attorney General shall have a law enforcement function but to withhold from him in a particular field the determination whether the machinery of law enforcement shall be put into motion.

The Department of Justice is not a branch of the government independent of the other executive branches and entitled to make its own policies.

The history of this particular legislation was that there was first passed a statute (the Sherman Act) empowering the Attorney General to bring a certain type of litigation which he had not theretofore been empowered to bring, and that there was later passed a statute entrusting one field expressly to a Commission with power of reference by the Commission to the Attorney General, after which he might conduct in his own discretion litigation of the same character.

The natural interpretation of the second statute, especially when made in the light of the settled principles favoring non-interference by the Courts with the functions of administrative bodies, is to say that the Attorney General may not act until after the reference to him thus specifically provided for.

That this is the natural interpretation, is recognized by the government in its brief, when it opens with the argument that the statute is to be construed as providing a new and merely auxiliary jurisdiction to the Commission, and not to have in any way affected the jurisdiction of the Attorney General. But this is just the argument that was unsuccessfully made by all the private parties who failed in cases of the *Myers* v. *Bethlehem Steel Corporation* type. In each of those cases the argument ran that there was an established and recognized procedure in the Courts and that the administrative statute in question had not provided for its repeal. If the Attorney General is not to be limited by the same argument, it can only be because there is a special exemption in his favor from the general rule applicable to administrative bodies. Congress did provide such an exemption in § 11 of the Clayton Act, discussed in

Georgia v. *Pennsylvania R. R. Company*, but it has not made such a provision in the Webb-Pomerene Act.

We believe that the case must, therefore, ultimately turn upon the basic question as to whether there is anything inherent either (1) in the Sherman Act which distinguishes it from any other Federal statute, or (2) in the position of the Attorney General which distinguishes him from any other litigant.

First. While recognizing the expressions of high esteem which this Court has accorded to the Sherman Act on many occasions, we do not suppose for a moment that this Court proposes to hold that there is any legally operative distinction between the Sherman Act and any other statute. The essence of the Sherman Act was that it confer a jurisdiction upon the Federal Courts. But that jurisdiction is no greater than any other jurisdiction to which the principle of exhaustion of administrative remedies has been applied. The Sherman Act, albeit that it has some of the breadth of a constitution, certainly does not have the power of a constitution to be superior to other statutes.

Second. There is a fundamental principle of our Anglo-American administration of justice that the Attorney General has no greater standing before the Courts than any other litigant and that he derives his powers, like other litigants, from the common law or from statute. In this case he finds his power in the Sherman Act, and finds the limitation upon his power in the Webb-Pomerene Act, interpreted in the light of the governing principles that had been applied to all litigants who had sought the jurisdiction of the Courts before the exhaustion of an administrative remedy provided by statute.

With great respect to the Attorney General, we suggest that what he has overlooked is that it is within his power and function, as law enforcement officer and a member of the executive branch of the government, to call to the attention of the other branches any supposed wrong of which he may have become cognizant. Thus, the government brief states here (off the record of course) that this action was based upon an investigation made by the Department of Justice rather than by the Federal Trade Commission. Assuming that fact, there is no reason why the Attorney General should not have called the attention of the Federal Trade Commission to the results of its investigation and put those results at its disposal, with a view to its functioning in the manner which the Congress contemplated when it added the two last paragraphs to § 5 of the Webb-Pomerene Act.

Indeed, if the Commission had then concluded that the Associations ought to make the same revision in their method of doing business which is now sought to be obtained by decree of the District Court, it would have recommended to them that they do so, and in the event that they had not thereupon done so, would doubtless have referred the matter back to the Attorney General for exercise by him in his discretion of his proper function of law enforcement. We do not share the Attorney General's view that there is something inherently wrong in confining him to his proper functions. Compare his brief at p. 37:

> "The Attorney General and the courts would operate, in other words, as mere agencies for enforcing the Commission's determinations; and the long-continued policy of leaving violations of the Sherman Act to judicial determination would, as to

violations of the Act by export associations and their members, be reversed."

We wonder whether the Attorney General has realized the implications in his argument. He is saying (1) that there is something wrong in the law enforcement officer of the government acting merely as an agency for enforcing the determinations of a branch of a government to which the Congress has entrusted responsibility, (2) that there is something wrong in the Courts being confined to such enforcement, (3) by inference that he himself and the Courts should be free to make policy, and (4) that they may find the justification for so doing in the fact that they had earlier been entrusted with such a power.

It was a very familiar argument with this Court in the years prior to about 1937 that there existed one or another inherent type of jurisdiction in the Federal Courts, and particularly in the Federal Equity Courts, which they might exercise regardless of various express Congressional enactments purporting to entrust primary responsibility to other government agencies. It was an argument which, although appealing to some members of this Court at an earlier date, has now come to be steadfastly rejected. We do not suppose that the Attorney General occupies in this respect a position any different from that of any other party which might appeal to older statutes and older procedures in the effort to frustrate a later Congressional policy.

This Court has said too often that its sole function, subject to the Constitution, is to interpret the law as Congress lays it down for it to be argued at this late date that there is some inherent sanctity in a "long continued policy

of * * * judicial determination" to which appeal may be made against more modern provisions of statute.

Respectfully submitted,

LELAND HAZARD
DAVID A. REED
CALVIN A. CAMPBELL
ROBERT T. MCCRACKEN
E. C. LEWIS
RALPH S. HARRIS
WILLIAM E. SIMS
H. G. HITCHCOCK
H. WEBSTER STULL
J. E. F. WOOD
F. C. LOWTHORP
BRUCE BROMLEY
GEORGE S. COLLINS
JOHN LOGAN O'DONNELL

Of Counsel in No. 1016

WM. DWIGHT WHITNEY
Counsel for Petitioners in No. 1016,
15 Broad Street,
New York, N. Y.

C. W. HOBSON
EDWARD D. LYMAN
JOHN L. REITH
WILLARD P. SCOTT

Of Counsel in No. 1017

FRED N. OLIVER
Counsel for Petitioners in No. 1017,
110 East 42d Street,
New York, N. Y.

May 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 14 1945
CHARLES ELMORE CROPLEY
CLERK

Nos. 1016-1017

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL.

v.

UNITED STATES OF AMERICA

CALIFORNIA ALKALI EXPORT ASSOCIATION, ET AL.

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	2
Argument	3
Conclusion	5
	12

CITATIONS

Cases:	
Columbia Gas & Elec. Corp. v. *American Fuel and Power Co.*, 322 U. S. 379	3
Ex Parte Peru, 318 U. S. 578	9, 10
Holiday v. *Johnston*, 313 U. S. 342	6
House v. *Mayo*, No. 921, this Term	6
In re Chetwood, 165 U. S. 443	7
In re 620 Church Street Corp., 299 U. S. 24	6
McClelland v. *Carland*, 217 U. S. 268	6
Roche v. *Evaporated Milk Assn.*, 319 U. S. 21	8, 9
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117	6
Steffler v. *United States*, 319 U. S. 38	6
Union Pacific R. R. Co. v. *Weld County*, 247 U. S. 282	6
Whitney v. *Dick*, 202 U. S. 132	6, 7
Statutes:	
Expediting Act as amended, Sec. 2, 15 U. S. C., sec. 29	3, 7
Judicial Code, Sec. 262, 28 U. S. C., sec. 377	2, 5
Webb-Pomerene Act of April 10, 1918:	
Sec. 2, 15 U. S. C., sec. 62	4
Sec. 3, 15 U. S. C., sec. 63	4
Sec. 5, 15 U. S. C., sec. 65	4

630552—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL.

v.

UNITED STATES OF AMERICA

CALIFORNIA ALKALI EXPORT ASSOCIATION, ET AL.

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court (R. 73) has not yet been reported.

JURISDICTION

The order of the District Court sought to be reviewed was entered on January 11, 1945 (R. 76–77). The motions for leave to file petitions for writ of certiorari have been filed in this Court by

United States Alkali Export Association, Inc., et al., and by California Alkali Export Association, et al. The jurisdiction of this Court is invoked under Section 262 of the Judicial Code (28 U. S. C., sec. 377).

QUESTION PRESENTED

The Government believes that the ruling for which review is sought is correct. It will not, however, discuss this question but will deal only with the question whether the circumstances of this case are such as to make it appropriate to issue the requested writs of certiorari or to grant leave to file petitions for such writs. The issue presented in this connection is:

> Whether the question sought to be reviewed is of such public importance as to warrant departure from the usual rule that a writ under Section 262 of the Judicial Code will not be granted to review an interlocutory ruling which is reviewable on appeal from final judgment when Congress has, as to the particular type of proceeding, authorized appeals only from final judgments.

STATUTES INVOLVED

Section 262 of the Judicial Code (28 U. S. C., sec. 377) provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be neces-

> sary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C. sec. 29), provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[1] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court * * *.

STATEMENT

This is a civil suit under Section 4 of the Sherman Act brought against two incorporated export trade associations, 13 domestic corporations manufacturing alkalis (all members of one or the other of the two defendant associations), and a British corporation manufacturing alkalis in Great Britain and a domestic subsidiary thereof, charging these defendants and certain named co-conspirators with being parties to a conspiracy in restraint of interstate and foreign commerce in alkalis, in violation of Section 1 of the Sherman Act. The complaint sets forth that each of the two defendant associations had filed a written statement with the Federal Trade Commission, as authorized by

[1] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

Section 5 of the Act of April 19, 1918 (15 U. S. C., sec. 61), known as the Webb-Pomerene Act, for the purpose of claiming on behalf of itself and its members the immunities conferred by Sections 2 and 3 of that Act (R. 12–13, 14–15).

The complaint is a comprehensive one and includes the charges (1) that the parties agreed to assign certain areas as the exclusive market territory of particular concerns or groups of concerns or to assign quotas to them in such areas, thus eliminating competition in foreign trade; (2) that the parties agreed that those who manufactured alkalis in other countries should not export their products to the United States; (3) that competition by exporters from the United States, not parties to the conspiracy, was systematically suppressed by the parties; and (4) that export quotas of producers of alkalis in the United States were manipulated by parties to the conspiracy for the purpose of maintaining prices in the domestic market. (R. 16–41.)

The defendants other than the British corporation and its domestic subsidiary filed a motion praying for dismissal of the complaint (R. 69, 72). The ground of the motion was that under Sections 2 and 5 of the Webb-Pomerene Act exclusive jurisdiction of the matters charged in the complaint is vested, in the first instance, in the Federal Trade Commission and that the District Court was therefore without jurisdiction. The District Court denied the motion. (R. 76-77) and

petitioners now seek to have this Court issue writs of certiorari to review this interlocutory ruling.

Petitioners do not question the correctness of the District Court's holding that the complaint sets forth a conspiracy not given immunity from the prohibitions of the Sherman Act by Section 2 of the Webb-Pomerene Act, for the reason that the immunity conferred is subject to certain limiting conditions to which the petitioners did not, under the allegations of the complaint, conform. The sole contention which is made is that notwithstanding the violation of the Sherman Act which stands admitted in the present state of the pleadings, under Section 5 of the Webb-Pomerene Act there can be no civil or criminal proceeding based on such violation until after the Federal Trade Commission has investigated the matter and reported its conclusions to the Attorney General.

ARGUMENT

The question raised by petitioners' motions is whether the case is an appropriate one for the exercise by this Court of power to issue a writ of certiorari under Section 262.

In nearly all the cases in which the Court has issued writs of certiorari under Section 262 the writ has issued to circuit courts of appeals. These cases had either come before the circuit courts of appeals under the usual appellate procedure or by reason of requests to those courts for the issu-

ance of writs under Section 262. Grant of certiorari by this Court did not involve—as it would in the present case—use of the writ to review an interlocutory ruling in circumvention of the appellate procedure established by Congress.

While we believe that the principles governing issuance of certiorari in the present case are to be found in this Court's discussion of issuance of writs of mandamus under Section 262 (see *infra*, pp. 8–10), we summarize immediately below the circumstances under which this Court has issued certiorari under that Section.

Certiorari has thus issued (1) where a right of appeal to the appropriate circuit court of appeals had been denied;[2] (2) to review a circuit court of appeals judgment reversing and remanding district court judgments, where writ of error to this Court would not lie, in order to avoid "further protracting the litigation";[3] (3) where a circuit court of appeals had denied a temporary injunction against collection of state taxes and petitioner alleged an unconstitutional taking of property and that it was without adequate remedy under State law;[4] (4) to review the action of circuit courts of appeals with respect to the issuance of writs under Section 262 itself;[5] and (5) to review orders of a

---

[2] *In re 620 Church Street Corp.*, 299 U. S. 24; *Holiday* v. *Johnston*, 313 U. S. 342; *Stefflер* v. *United States*, 319 U. S. 38; *House* v. *Mayo*, No. 921, this Term, decided February 5, 1945.

[3] *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

[4] *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 2[illegible]

[5] *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268.

Federal trial court prohibiting the petitioner from prosecuting writs of error to this Court from decisions of a state court and adjudging him in contempt for violation of such orders.[6]

One of the cited cases, *Whitney* v. *Dick*, 202 U. S. 132, warrants brief comment. In that case the circuit court of appeals had issued a writ of certiorari under Section 262 to reverse a judgment of conviction upon the ground that the district court was without jurisdiction. This Court reversed the circuit court of appeals, holding that since the jurisdictional question could be raised by writ of error, grant of certiorari was erroneous. The Court said (p. 140): "There must be 'circumstances imperatively demanding' a departure from the ordinary remedy by writ of error or appeal." It also said (*ibid.*) that the reasons prompting the improper issuance of certiorari in the case were similar to those frequently prompting writs of habeas corpus, namely, "to put an end to the litigation by some short summary process" rather than to proceed in "the orderly way" by writ of error, and that the Court had "repeatedly held against this procedure."

The present proceeding is one in which Congress has authorized appeals only from final judgment.[7]

---

[6] *In re Chetwood*, 165 U. S. 443. The Court said (p. 462): "Judgments in proceedings in contempt are not reviewable here on appeal or error [citing cases]; but they may be reached by certiorari in the absence of any other remedy."

[7] See Section 2 of the Expediting Act, *supra*, p. 3.

The question of the District Court's jurisdiction which petitioners seek to bring before this Court is one which they can have reviewed on such an appeal, if one is later prosecuted.

In *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, this Court fully reviewed the considerations governing issuance of a special writ under Section 262 to review an interlocutory ruling in a proceeding in which the appellate procedure established by Congress authorizes review only of final judgments. In that case the circuit court of appeals had issued a writ of mandamus to a district court to require it to set aside a ruling holding invalid certain pleas in abatement to an indictment. This Court reversed, holding that the granting of the writ was an abuse of discretion. The Court, after pointing out (pp. 29–30) that circuit courts of appeals have, with immaterial exceptions, been given jurisdiction to review only final decisions of district courts, said (p. 30):

> Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.[8]

[8] That the doctrine enunciated is not limited to criminal cases is made clear by the Court's citation, immediately following the above quotation, of decisions applying the same doctrine in civil cases.

The Court also said (p. 26) that while the traditional use of the writ of mandamus had been to confine an inferior court to its prescribed jurisdiction or to compel it to exercise its authority when under a duty to do so, appellate courts are reluctant even in such cases to grant the writ as to questions "which are reviewable in the regular course of appeal," and the Court referred (p. 31) to its numerous decisions holding that mandamus will not issue to review an order overruling a plea to the jurisdiction.

As to the special considerations justifying the issuance of writs of mandamus, the Court (pp. 31–32) cited the following as examples: a persistent disregard of the Rules of Civil Procedure; refusal of a court to perform a plain ministerial duty; involvement of comity between state and Federal courts; and an erroneous assumption of jurisdiction interfering with the petitioner's right to a jury trial.

Mandamus will issue to review an interlocutory ruling if prompt determination of the question whether the lower court is improperly exercising its jurisdiction is of sufficient "public importance." *Ex Parte Peru*, 318 U. S. 578. In a proceeding *in rem* against a vessel owned by the Republic of Peru the district court had denied a claim of sovereign immunity. Since the State Department's certification of the vessel's immunity constituted

a determination by the political arm of the Government, conclusive on the courts, that continued retention of the vessel "interferes with the proper conduct of our foreign relations," this Court felt that giving prompt effect to the action of the political branch of the Government was of "such public importance and exceptional character as to call for the exercise of our discretion to issue the writ" (318 U. S. 586–587).

The Government does not believe that immediate determination of the District Court's jurisdiction in the present case is of similar importance. Petitioners' suggestion (Pet. U. S. Alkali Export Assn. 9) that the question, while it remains unresolved, will lead to prolonged proceedings simultaneously in Federal courts and before the Federal Trade Commission in this and other cases is unsound. The Webb-Pomerene Act has been in force for more than 25 years and the question here presented has now arisen under that Act for the first time. Petitioners' further suggestion (*ibid.*) that postponement of final determination of the question will impair plans for a revival of post-war international trade is equally unsound. The mooted question is purely procedural and does not relate to the scope of the prohibitions of the substantive law.

If this Court should grant the requested writs and should consider the question whether investi-

gation and report by the Federal Trade Commission are a condition precedent to any proceeding under the Sherman Act against activities carried on by export associations registered under the Webb-Pomerene Act, it would be necessary to decide whether judicial consideration of the allegations of the complaint is barred wholly or only in part and whether it is barred as against only the defendant export trade associations or as against all defendants who are members of such an association. Such questions can be much better determined, we believe, after trial of the issues has disclosed the full facts than on the bare allegations of the complaint.

If the proposed petitions for certiorari were within the purview of Section 240 of the Judicial Code and therefore involved no departure from the procedure established by Congress to govern appellate review, the Government would not oppose grant of certiorari; for the question of the relative functions of the Federal Trade Commission and the district courts under the Webb-Pomerene Act is a significant one, even if not, in our view, one of great doubt. Our present objection goes simply to the undesirability of establishing a precedent for bringing before this Court, without any compelling reason therefor, an intermediate ruling in an antitrust proceeding.

CONCLUSION

For the reasons stated, it is respectfully submitted that the motions for leave to file petitions for writs of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
CHARLES H. WESTON,
HERBERT A. BERMAN,
Special Assistants to the Attorney General.

FEBRUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE 1945

FILE COPY

APR 26 1945
CHARLES ELMORE CROPLEY
CLERK

Nos. 1016 and 1017

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

CALIFORNIA ALKALI EXPORT ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	5
Summary of argument	8
Argument:	
I. The order of the district court denying petitioners' motion to dismiss the complaint may not be appropriately reviewed at the present stage of the proceedings by writ of certiorari under Section 262 of the Judicial Code	12
II. The powers respecting export associations given to the Federal Trade Commission by the Webb-Pomerene Act are purely investigatory and advisory and these powers are in aid of, not in substitution for, the remedies and sanctions given by the Sherman Act against violators thereof	23
A. The applicable provisions of the Webb-Pomerene Act	23
B. The Webb-Pomerene Act gives to the Commission investigatory and advisory powers respecting violations of the Sherman Act by export associations, in supplement of the remedies against such violations provided by the Sherman Act	28
C. The provisions for enforcement of the Sherman Act are not repealed, as to export associations, by the Webb-Pomerene Act, nor does that Act make application of these provisions to such an association conditional upon the happening of the various contingencies under which the Commission may refer to the Attorney General its "recommendations" concerning the business of the association	33
D. The legislative history of the Webb-Pomerene Act strongly tends to refute petitioners' construction of the statute	39
E. In analogous situations a statutory grant of administrative authority has been held not to confer upon the administrative agency primary jurisdiction of violations of the Sherman Act	48

641361—43——1

Page

Conclusion 55
Appendix: The Webb-Pomerene Act of April 10, 1918 56

CITATIONS

Cases:

Adams v. *United States*, 317 U. S. 269 14
Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U. S. 137 16
Apex Hosiery Co. v. *Leader*, 310 U. S. 469 48
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344 49
Bank of Columbia v. *Sweany*, 1 Pet. 567 14
Columbia Gas & Elec. Corp. v. *American Fuel & Power Co.*, 322 U. S. 379 5
Ex parte Peru, 318 U. S. 578 ..... 9, 13, 18, 19
Ex parte United States, 287 U. S. 241 19
Georgia v. *Pennsylvania Railroad Co.*, decided March 26, 1945 53
Holiday v. *Johnston*, 313 U. S. 342 20
House v. *Mayo*, No. 921, this Term, decided February 5, 1945 20
In re Chetwood, 165 U. S. 443 20
In re 620 Church Street Corp., 299 U. S. 24 20
Keogh v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156 53
McClellan v. *Carland*, 217 U. S. 268 22
Morgan v. *United States*, 298 U. S. 468, 304 U. S. 1 52
Nat. Broadcasting Co. v. *U. S.*, 319 U. S. 190 53
Roche v. *Evaporated Milk Assn.*, 319 U. S. 21 ..... 13, 14, 16, 17
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117 21
Stefflер v. *United States*, 319 U. S. 38 20
Union Pacific R. R. Co. v. *Weld County*, 247 U. S. 282 21
United States v. *Borden Co.*, 308 U. S. 188 ..... 12, 28, 50, 51, 54
United States v. *California Cooperative Canneries*, 279 U. S. 553 ..... 9, 15
United States v. *Hutcheson*, 312 U. S. 219 35
United States v. *International Harvester Co.*, 274 U. S. 693 38
United States v. *Joint Traffic Assn.*, 171 U. S. 505 53
United States v. *Pacific & Arctic Co.*, 228 U. S. 87 53
United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 53
Whitney v. *Dick*, 202 U. S. 132 ..... 13, 17, 21, 22

Statutes:

Agricultural Adjustment Act, Sec. 8b, 7 U. S. C. sec. 608b 52
Bituminous Coal Act of 1937, Sec. 4 (d), 15 U. S. C. sec. 832 (d) 52
Capper-Volstead Act, Secs. 1 and 2, 7 U. S. C. secs. 291, 292 50

Statutes—Continued

Clayton Act: Page

Sec. 11, 15 U. S. C. sec. 21 ..... 31, 32, 38, 39

Sec. 15, 15 U. S. C. sec. 25 32

Sec. 16, 15 U. S. C. sec. 26 36

Expediting Act of February 11, 1903, as amended, Sec. 2, 15 U. S. C. sec. 29 ..... 4, 9, 15

Federal Trade Commission Act:

Sec. 5, 15 U. S. C. sec. 45 ..... 31, 38, 39

Sec. 6, 15 U. S. C. sec. 46 ..... 29, 30, 39, 40

Sec. 7, 15 U. S. C. sec. 47 30

Sec. 8, 15 U. S. C. sec. 48 30

Sec. 9, 15 U. S. C. sec. 49 31

Sec. 10, 15 U. S. C. sec. 50 31

Interstate Commerce Act, Sec. 5 (11), 49 U. S. C. sec. 5 (11) 52

Judicial Code:

Sec. 128, 28 U. S. C. sec. 225 (a) 17

Sec. 238, 28 U. S. C. sec. 345 ..... 4, 15

Sec. 262, 28 U. S. C. sec. 377 ..... 4, 12

Sherman Act of July 2, 1890, 26 Stat. 209, as amended 27, 48

Sec. 1, 15 U. S. C. sec. 1 ..... 3, 35

Sec. 2, 15 U. S. C. sec. 2 3

Sec. 4, 15 U. S. C. sec. 4 ..... 3, 35

Sec. 7, 15 U. S. C. sec. 7 36

Shipping Act, 1916, Sec. 5, 46 U. S. C. sec. 814 52

Webb-Pomerene Act of April 10, 1918, 40 Stat. 516, 15 U. S. C. sec. 61 *et seq* 3, 28, 37, 52, 54

Sec. 1 ..... 23, 26, 56

Sec. 2 ..... 9, 23, 24, 25, 52, 56

Sec. 3 26

Sec. 4 26

Sec. 5 ..... 10, 23, 25, 26, 31, 38, 39, 45, 46, 57

Congressional Material:

55 Cong. Rec., pt. 3, 2788 46

55 Cong. Rec. pt. 4, p. 3579 44

56 Cong. Rec. pt. 1, p. 173 43

56 Cong. Rec. pt. 5, p. 4724 43

H. Rep. No. 1118, 64th Cong., 1st sess 40, 42

H. Rep. No. 50, 65th Cong., 1st sess 41, 43

S. Rep. No. 1056, 64th Cong., 2d sess 41, 44

S. Rep. No. 109, 65th Cong., 1st sess 41

Serial 48, 64th Cong., 1st sess., pp. 82–83 40

Miscellaneous:

Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 Col. L. Rev. 805 23

Report of Federal Trade Commission, *Cooperation in American Export Trade*, vol. 1, pp. 370–375, 376 ..... 40, 41

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1016

UNITED STATES ALKALI EXPORT ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 53) is reported in 58 F. Supp. 785.

JURISDICTION

The order of the district court sought to be reviewed was entered on January 11, 1945 (R.

56). The petition for a writ of certiorari was presented for filing in No. 1016 on January 17, 1945, and the like petition in No. 1017 was presented on January 23, 1945; and the petitioners shortly thereafter filed motions for leave to file these petitions. The jurisdiction of this Court is invoked under Section 262 of the Judicial Code, 28 U. S. C. sec. 377.

On March 5, 1945, this Court granted the petitions and requested counsel to discuss in their briefs and upon oral argument the question whether the district court's order "may appropriately be reviewed at the present stage of the proceedings by writ of certiorari under section 262 of the Judicial Code" (R. 58).

QUESTIONS PRESENTED

(1) Whether the order of the district court denying petitioners' motion to dismiss the complaint for want of jurisdiction may appropriately be reviewed by this Court at the present stage of the proceedings by writ of certiorari under Section 262 of the Judicial Code.

(2) If the first question is answered in the affirmative, whether the district court's order was proper. This depends, in our view, upon whether the powers given the Federal Trade Commission by Section 5 of the Webb-Pomerene Act are investigatory and advisory, and merely supplementary to the other remedies provided by law for enforcement of the Sherman Act, or whether Section 5 impliedly repeals these remedies and

vests in the Federal Trade Commission exclusive primary jurisdiction to determine violations of the Sherman Act by export associations.

STATUTES INVOLVED

The pertinent provisions of the Act of April 10, 1918, 40 Stat. 516, sometimes called the Webb-Pomerene Act, 15 U. S. C. sec. 61 *et seq.*, are set forth in the Appendix, *infra*, pp. 56–59.

Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, familiarly known as the Sherman Act, 15 U. S. C. secs. 1, 2, 4, provide in part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal, shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty

> of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, under which the jurisdiction of this Court is invoked, provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 238 of the Judicial Code, 28 U. S. C. sec. 345, provides in part:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> (1) Section 2 of the Act of February 11, 1903, "to expedite the hearing and determination" of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.
>
> * * * * *

Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. sec. 29, provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[1] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court. * * *.

STATEMENT

On March 16, 1944, the United States brought a civil action under Section 4 of the Sherman Act against two unincorporated export associations, thirteen domestic producers of alkalis[2] (each a member of one of the defendant export associations), a British producer of alkalis, and a domestic subsidiary of the British corporation, charging them and their co-conspirators with having been engaged in a conspiracy in restraint of interstate and foreign commerce in alkalis, in violation of Section 1 of the Sherman Act (R. 2–6, 11–12). Two additional domestic producers of alkalis and a Belgian producer and a German producer were named as co-conspirators (R. 6–7).

The principal allegations of the complaint may be summarized as follows:

Prior to 1940 the defendant associations exported more than 95% of all alkalis exported

[1] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

[2] The word "alkalis" is defined to include soda ash (sodium carbonate), caustic soda (sodium hydroxide), and bicarbonate of soda (R. 7).

from this country (R. 11);[3] "all important" domestic producers, with one exception, are members of the associations (*ibid.*). The defendant British producer enjoys a virtual monopoly in the sale of alkalis in the British Empire, the co-conspirator Belgian corporation is the principal manufacturer of alkalis on the European continent, and the co-conspirator German corporation is the most important manufacturer in Germany (R. 8–9).

Each of the two defendant associations had filed a written statement with the Federal Trade Commission, as authorized by Section 5 of the Webb-Pomerene Act, for the purpose of claiming on behalf of itself and its members the immunities conferred by Sections 2 and 3 of that Act (R. 9, 10–11). By means of a series of cartel agreements, the parties undertook to control trade in alkalis throughout the world. The complaint alleges, *inter alia*, that (1) the parties agreed to assign certain areas as the exclusive market territory of particular concerns or groups of concerns, or to assign quotas to them in such areas, thus eliminating competition in foreign trade; (2) the parties also agreed that those who manufactured alkalis in other countries should not export their products to the United States; (3) competition by exporters from the United States,

[3] Due to war conditions and one resignation from membership in 1941, this percentage has since fallen to 75% (R. 11).

not parties to the conspiracy, was systematically suppressed by the parties; and (4) export quotas of producers of alkalis in the United States were manipulated by parties to the conspiracy for the purpose of maintaining prices in the domestic market (R. 11–31).

The conspiracy has resulted, as intended by the defendants, in—

(1) Wholly eliminating exports of alkalis to the United States by the defendant British producer and the two co-conspirator foreign producers;

(2) Wholly eliminating exports of alkalis from the United States by the defendant associations and their members and other domestic producers, to many markets of the world;

(3) Restricting exports by such persons to many world markets;

(4) Preventing independent domestic producers of alkalis from competing with the defendants and their co-conspirators in various markets of the world;

(5) Preventing independent exporters from exporting alkalis from the United States;

(6) Curtailing and limiting the production of alkalis in this country;

(7) Stabilizing, enhancing, and maintaining at uniform and arbitrary levels the prices at which caustic soda is sold in the United States (R. 30–31).

The defendants, other than the British corporation and its domestic subsidiary, moved in the district court for a dismissal of the complaint for alleged lack of jurisdiction of the subject matter of the action. The sole ground of the motion was that under Sections 2 and 5 of the Webb-Pomerene Act exclusive jurisdiction of the matters charged in the complaint is vested, in the first instance, in the Federal Trade Commission (R. 50–52). After the district court had entered an order denying the motion (R. 56–57), motions for leave to file petitions for writs of certiorari under Section 262 of the Judicial Code to review the district court's order were filed in this Court. The petitions for certiorari were granted and the cases ordered consolidated for argument (R. 57–58).[4]

SUMMARY OF ARGUMENT

I

This Court in granting or denying the common law writs authorized by Section 262 of the Judicial Code looks to the principles guiding judicial discretion in the use of an extraordinary remedy. The writ is most commonly issued by an appellate court when the action of an inferior court (1) is not subject to corrective review by any other means and (2) thwarts or tends to thwart appel-

[4] Petitioners in No. 1016 are United States Alkali Export Association, Inc., and its members. Petitioners in No. 1017 are California Alkali Export Association and its members.

late review. The writ may not appropriately be used as a substitute for appeal and will ordinarily be denied where the question raised is reviewable by the regular course of appeal or if the ruling below was interlocutory and the prescribed appellate procedure authorizes appeals only from final judgments.

In this case the applicable statute—the Expediting Act—permits appeals only from final judgments, and the question raised by petitioners can be reviewed on such appeal. Furthermore, a purpose of the statute was to preclude appeals from interlocutory rulings. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558.

While it may be appropriate to issue a writ under Section 262 if a prompt determination by this Court of the issue which is raised is of public importance (*Ex parte Peru*, 319 U. S. 578), it is doubtful whether in the present case immediate intervention by this Court in order to review the interlocutory ruling of the district court is of sufficient public importance to warrant departure from the legislative injunction against piecemeal appeals in this class of cases.

II

Any export association which goes beyond the limited immunity from the Sherman Act given by Section 2 of the Webb-Pomerene Act is subject to the prohibitions of the Sherman Act. The authority given the Federal Trade Commission by

Section 5 of the Webb-Pomerene Act to investigate violations of law by export associations, and to make "recommendations" concerning carrying on their business in the future in accordance with law, is of an investigatory and advisory nature, in supplement of the sanctions and remedies for enforcing the Sherman Act provided by prior legislation. The language of Section 5 of the Webb-Pomerene Act corresponds to provisions of the Federal Trade Commission Act conferring on the Commission purely investigatory and advisory powers; such provisions do not derogate from the enforcement powers conferred upon the Attorney General and the courts. The recommendations which the Commission is authorized to make are not given enforceability. Comparison of the *ex parte* investigations authorized by Section 5 with the detailed procedural provisions of those sections of the Trade Commission Act and of the Clayton Act which do give to the Commission primary jurisdiction of certain prohibitions of these statutes further indicates that Section 5 of the Webb-Pomerene Act did not vest in the Commission exclusive primary jurisdiction of violations of the Sherman Act by export associations.

The legislative history of the Webb-Pomerene Act confirms the Government's interpretation of the statute. Congress intended that the non-exempt activities of export associations should be fully subject to the pains and penalties of the

Sherman Act. Had Congress intended a reversal of its established policy of (1) leaving it to the courts to determine the meaning and application of the Sherman Act and (2) imposing upon the Attorney General the duty to enforce the Act, it is reasonable to assume that this would have received some notice and consideration in Congress. The silence of the record in this respect attests the absence of any such intent by Congress.

If a judicial proceeding under the Sherman Act against an export association is conditional upon the happening of all of the contingencies set forth in Section 5 of the Webb-Pomerene Act, the criminal penalties of the Sherman Act are rendered inapplicable to such associations and are thus repealed as to them by implication. Under petitioners' construction of Section 5, the unqualified jurisdiction of the district courts over civil proceedings to enforce the Sherman Act would also be converted into a conditional and contingent jurisdiction and the prior grant of such jurisdiction would *pro tanto* be repealed by the later Act. It is a settled principle, however, that repeals by implication are not favored.

In situations analogous to that here presented this Court has declined to construe legislation conferring authority upon an administrative body as qualifying the power of the Attorney General to institute, and the power of the courts to entertain, the proceedings authorized by Congress for en-

forcement of the Sherman Act. See *United States v. Borden Co.*, 308 U. S. 188.

ARGUMENT

Petitioners do not question the holding of the district court that, under the allegations of the complaint, they are not within any immunity from the Sherman Act given by Section 2 of the Webb-Pomerene Act (R. 55); nor do they deny that, under these allegations, they have been violating the Sherman Act. Their sole contention is that Section 5 of the Webb-Pomerene Act, by authorizing the Federal Trade Commission to investigate possible violations of the Sherman Act by export associations and to make recommendations, based on such investigation, as to how an offending association may readjust its business so that it may thereafter be conducted in accordance with law, deprives the district courts of jurisdiction of any proceeding under the Sherman Act against an export association unless or until the Commission has made recommendations pursuant to Section 5 and these recommendations have not been complied with.

I

THE ORDER OF THE DISTRICT COURT DENYING PETITIONERS' MOTION TO DISMISS THE COMPLAINT MAY NOT BE APPROPRIATELY REVIEWED AT THE PRESENT STAGE OF THE PROCEEDINGS BY WRIT OF CERTIORARI UNDER SECTION 262 OF THE JUDICIAL CODE

We take as the premise of our argument that under Section 262 of the Judicial Code, 28 U. S. C.

sec. 377, this Court is authorized "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of" its jurisdiction "and agreeable to the usages and principles of law." Issuance of common law writs under this provision rests within the sound discretion of the Court; and, in cases other than those in which the Court has original jurisdiction, a writ may be issued only in aid of the Court's appellate jurisdiction. *Ex parte Peru*, 318 U. S. 578, 582–584; *Whitney* v. *Dick*, 202 U. S. 132, 136, 140. The question presented is not whether this Court has power to grant the writ but whether, in the light of all the circumstances, this is an appropriate case for the exercise of its discretionary power.

The criteria governing exercise of this power are well-settled. The Court will "look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26. If no action or omission on the part of the inferior court "has thwarted or tends to thwart appellate review" of its ruling, this is an important consideration militating against issuance of the writ; and while a function of the writ "is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute" (*ibid.*). A traditional use of the writ has been

to confine an inferior court to its prescribed jurisdiction or to compel it to exercise its authority when under a duty to do so, but even in such cases appellate courts are "reluctant to interfere" with a lower court's decision of a jurisdictional question which is "reviewable in the regular course of appeal" (*ibid*).

"Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases." *Id.*, p. 30. This principle is not confined to criminal cases. In a civil proceeding Chief Justice Marshall pointed out that to grant the writ in such a situation would be a "plain evasion" of the Congressional enactment that only final judgments be brought up for appellate review, and said that the effect of this mode of interposition would be that "the same cause might come before this court many times, before there would be a final judgment." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569.

In *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274, this Court said that the rule that a writ under Section 262 should not do service for an appeal "must be strictly observed if orderly appellate procedure is to be maintained", but that the writ may be used in "exceptional

cases where, because of special circumstances," it "may fairly be said to be reasonably necessary in the interest of justice".

We believe that the circumstances of this case do not warrant invocation by this Court of its extraordinary powers under Section 262 for the purpose of reviewing at this stage of the litigation the interlocutory order entered by the district court. The Court's appellate jurisdiction in this class of cases depends upon Section 238 of the Judicial Code, 28 U. S. C. sec. 345. The language of that section is significant:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, *and not otherwise;* * * * [Italics added.]

The present case falls within the first of the five Acts enumerated in Section 238, namely, Section 2 of the Expediting Act of February 11, 1903 (*supra*, pp. 4–5). In the latter Act Congress explicitly provided that appeals in equity cases brought by the United States under the Sherman Act can be taken only to this Court and only from the "final" decree of the district court. This Court has said that a purpose of the Expediting Act was to bar any appeal from an interlocutory ruling. In *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558, the Court, after referring to the delays in ob-

taining final adjudication in Sherman Act cases under prior appellate procedure, said:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree.

See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142.

The *Roche* case held that, in view of the statutory provision that (with some exceptions not material) appeals lie to circuit courts of appeals only from final judgments of district courts,[3] the circuit court of appeals in that case had abused its discretion in granting a writ under Section 262 to review an interlocutory ruling of the district court. Where, as in the instant case, a special statute governs appellate review and limits such review to final judgments, there would seem to be even less basis for circumvention, by grant of a writ under Section 262, of the prescribed appellate procedure.

The question of the jurisdiction of the district court which the present petitioners seek to bring

[3] Judicial Code, Sec. 128, 28 U. S. C. sec. 225 (a).

before this Court can be reviewed on appeal from any final judgment entered in the cause. Petitioners therefore cannot support grant of the writ under Section 262 upon the ground that this is the only means by which they can obtain appellate review of the jurisdictional question which they have raised.

It is immaterial that trial of the present case might be lengthy, costly, and inconvenient and that immediate review might establish that the district court was without jurisdiction. Such "inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable". *Roche* v. *Evaporated Milk Assn.*, at p. 30.

That the question raised goes to the jurisdiction of the inferior court is not ordinarily considered sufficient ground for grant of an extraordinary remedy if, as in this case, such question is reviewable under the prescribed appellate procedure (*supra*, pp. 13–14). See also *Whitney* v. *Dick*, 202 U. S. 132, discussed *infra*, pp. 21–22. Nor do the decisions indicate that where the question decided below was one of first impression this circumstance furnishes occasion for the grant of such remedy.

There remains for consideration the question whether the case is of such extraordinary public importance that this Court should promptly de-

termine the question raised by petitioners. *Ex parte Peru,* 318 U. S. 578. As to this, the relevant factors appear to be: (1) The respective jurisdictions of the federal courts and of a Governmental agency are in issue. (2) This question, while it remains unsettled, may affect to some degree the extent to which those engaged in the export trade utilize export associations organized to obtain the immunity given by Section 2 of the Webb-Pomerene Act. (3) Although the Government does not presently contemplate institution of any other proceeding involving the same jurisdictional question, it concedes that occasion for bringing such a proceeding may arise prior to this Court's determination of any appeal taken from the district's final judgment in the instant case.

We would not suppose that immediate review by this Court is, by reason of the above considerations, of such public importance that it would be an appropriate exercise of discretion to grant a writ under Section 262 to review an interlocutory ruling (reviewable on appeal from final judgment), in circumvention of the statutory provisions authorizing appeal in this type of proceeding only from final judgments and precluding piecemeal appeals from interlocutory orders.

On the question of the public importance of prompt final adjudication of the issue presented, prior precedents, necessarily resting on their

peculiar facts, are not of much value. *Ex parte Peru* was a proceeding *in rem* against a vessel of a friendly foreign Government and our Department of State had supported the immunity from attachment asserted by the foreign Government and had thus, in effect, declared that "the continued retention of the vessel [by the district court] interferes with the proper conduct of our foreign relations." See 318 U. S. 578, 589.

In *Ex parte United States*, 287 U. S. 241, as in *Ex parte Peru*, the question chiefly considered and decided was not whether the circumstances were such as to make it appropriate to issue a writ under Section 262, but whether this Court should decline to issue the writ because application therefor could be made to the circuit court of appeals to which direct appeal in the cause lay. In *Ex parte United States* the district court had refused to issue a bench warrant for the arrest of a person against whom there had been returned an indictment fair on its face. An extraordinary writ under Section 262 was the only available remedy to prevent a plain miscarriage of justice which, if not corrected, would thwart appellate jurisdiction of the cause.

It is pertinent to suggest that grant of certiorari in the present case may lead to many applications for writs under Section 262 in Sherman Act proceedings. In the short time which has elapsed since this Court granted the present peti-

tions for certiorari, the defendants in another Sherman Act proceeding have applied to this Court for certiorari under Section 262 to obtain review of an interlocutory ruling.[6]

We point out, finally, that the cases in which this Court has issued certiorari under Section 262 furnish no precedent for grant of that writ in the instant case. The most common use of the writ has been in cases where the only appeal from a decision of a district court was to the circuit court of appeals and that court had denied appeal to it.[7] Such denial operated to thwart appellate review, and correction of error by extraordinary remedy was therefore appropriate. This was also the situation in *In re Chetwood*, 165 U. S. 443, where this Court issued a writ of certiorari under Section 262 to review orders of a federal trial court which had prohibited the petitioner from prosecuting writs of error to this Court from decisions of a State court and had adjudged the petitioner in contempt for violating such orders.[8]

---

[6] See applications of DeBeers Consolidated Mines, Ltd., et al., and Societe Internationale, etc., Du Congo, et al., filed April 6, 1945.

[7] *In re 620 Church Street Corp.*, 299 U. S. 24; *Holiday* v. *Johnston*, 313 U. S. 342; *Steffler* v. *United States*, 319 U. S. 38; *House* v. *Mayo*, No. 921, this Term, decided February 5, 1945.

[8] The Court there said (p. 462): "Judgments in proceedings in contempt are not reviewable here on appeal or error

Instances in which this Court has issued certiorari under Section 262 to review a decision of a circuit court of appeals in a case coming before that court under applicable appellate procedure[9] involved no departure from the policy established by Congress to confine appellate review, with specified exceptions, to the final judgments entered by district courts.

There is likewise no departure from that policy when this Court issues certiorari under Section 262 to review a writ issued by a circuit court of appeals under the same section. Two cases in which this has occurred are, we believe, of some significance. In *Whitney* v. *Dick*, 202 U. S. 132 the circuit court of appeals had issued a writ under Section 262 to reverse a judgment of conviction upon the ground that the district court was without jurisdiction. This Court, in reversing the action of the circuit court of appeals, held that since the jurisdictional question could be raised in the circuit court of appeals by writ of error, review thereof by that court through issuance of an extraordinary writ under Section 262 was erroneous. The Court said (p. 140): "There must be 'circumstances imperatively demanding' a departure from the ordinary remedy

[citing cases]; but they may be reached by certiorari in the absence of any other remedy."

[9] *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

by writ of error or appeal." It also said (*ibid.*) that the reasons prompting the improper issuance of certiorari in the case were similar to those frequently prompting writs of habeas corpus, namely, "to put an end to the litigation by some short summary process" rather than to proceed in "the orderly way" by writ of error, and that the Court had "repeatedly held against this procedure."

In *McClellan* v. *Carland*, 217 U. S. 268, on the other hand, application had been made to the circuit court of appeals for a writ of mandamus directed to a federal district judge to require him to vacate certain orders which he had issued staying proceedings in an action pending before him until final adjudication of the issues involved in a proceeding about to be instituted in a State court. Since such action by the trial court operated to prevent determination of the cause and thwarted appellate review thereof, this Court held that the circuit court of appeals had erred in not issuing the requested writ under Section 262.

II

THE POWERS RESPECTING EXPORT ASSOCIATIONS GIVEN TO THE FEDERAL TRADE COMMISSION BY THE WEBB-POMERENE ACT ARE PURELY INVESTIGATORY AND ADVISORY, AND THESE POWERS ARE IN AID OF, NOT IN SUBSTITUTION FOR, THE REMEDIES AND SANCTIONS GIVEN BY THE SHERMAN ACT AGAINST VIOLATORS THEREOF

A. *The Applicable Provisions of the Webb-Pomerene Act*

The Webb-Pomerene Act deals with associations [10] organized for and engaged solely in export trade. The basic provisions of the Act are those of Section 2.[11] This section provides that the Sherman Act shall not be construed as rendering illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such trade, or any act or agreement by it in the course of such export trade, provided (1) that—

> such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association

---

[10] Section 1 of the Act (*infra*, p. 56) defines the word "association" as meaning "any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations."

[11] The full text of Sections 2 and 5 of the Act is set forth in the Appendix, *infra*, pp. 56–59. See, generally, Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 Col. L. Rev. 805.

and (2) that—

> such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

These provisos fix the boundaries of the exemption from the Sherman Act given to export associations. Briefly stated, they limit the exemption to combinations, called associations, which confine themselves, both in objective and in actual practice, exclusively to export trade and which do not restrain either domestic trade or the export trade of their domestic competitors. Under Section 2, therefore, such associations and their acts and agreements which are not within the limits of the immunity specified by this section are in the same position as if the Webb-Pomerene Act had never been passed; they are subject to all the prohibitions of the Sherman Act and to its criminal and civil sanctions. The clear demarcation, expressed by the language of the statute, between immunity under the Sherman Act for conduct affecting exclusively export trade (and not in restraint of export trade of domestic competitors) and non-immunity under the Act for other types

of activities of export associations and their members was, as we shall show later (*infra*, pp. 39–44), deliberately intended by Congress when it enacted this legislation.

Although Section 2 carefully defines the limits of the immunity which it gives (and thereby implicitly negatives the grant of any further immunity), petitioners contend that Section 5 of the Webb-Pomerene Act has the effect of suspending and rendering inoperative, as to export associations, all sanctions and remedies given by the Sherman Act against those who violate its provisions, unless and until certain steps and proceedings authorized by Section 5 of the Webb-Pomerene Act have occurred. By virtue of Section 5, it is contended, "primary" jurisdiction to determine the application of the Sherman Act to export associations has been vested in the Federal Trade Commission.

Section 5, upon which petitioners rely, is in three paragraphs. The first paragraph requires every export association to file with the Commission, within 30 days of its creation and annually thereafter, data as to its charter, officers, members or stockholders, and the location of its offices. Such association must also furnish the Commission such information as it may require concerning the association's business practices, and its relation to other associations, corporations and individuals. An association which fails to ob-

serve these requirements loses the immunity given by Section 2 of the Act and is also liable to forfeit to the United States $100 for each day of delinquency.

The second paragraph of Section 5 provides that whenever the Federal Trade Commission has reason to believe that an export association has done any of the things specified in the provisos of Section 2, the Commission shall conduct an investigation. If the Commission concludes, upon investigation, that there has been a violation of law, it "may" make to the association "recommendations" for the readjustment of its business in order that it may thereafter maintain its organization and conduct its business "in accordance with law". If the association fails to comply with these recommendations the Commission shall refer its findings and recommendations to the Attorney General for such "action thereon" as he may deem proper.

The third paragraph of Section 5 provides that for the purpose of enforcing these provisions the Commission shall have all the powers, so far as applicable, given it by the Federal Trade Commission Act.[12]

---

[12] To complete the outline of the Act: Section 1 defines certain terms used in the Act. Section 3 provides that Section 7 of the Clayton Act shall not prohibit acquisition of stock of an export association unless the effect may be to restrain trade or substantially lessen competition "within the United States". Section 4 makes Section 5 of the Federal

It should be noted that the Webb-Pomerene Act, apart from its requirements as to filing or furnishing certain information, imposes no duties or prohibitions of any kind. An association which does not stay within the limits of the exemption given by Section 2 violates, not the Webb-Pomerene Act, but the Sherman Act. The former Act is therefore not one in which Congress has created a new wrong or imposed new substantive obligations, as to which it might be appropriate to commit to an administrative agency initial determination of the scope of the conduct proscribed or prescribed.

Under the Sherman Act, it is the courts which determine the scope of its prohibitions. This had been the policy of Congress for some 20 years prior to passage of the Webb-Pomerene Act. For Congress to provide that determination of the scope of the prohibitions of the Sherman Act should, in the case of export associations, be exclusively determined by an administrative agency would constitute a major change in legislative policy. It would also be, as we point out later (*infra*, pp. 35–36), a repeal by implication of the provisions of prior legislation vesting in the Attorney General power to bring proceedings to

---

Trade Commission Act applicable to unfair methods of competition in export trade even though the acts constituting the unfair methods are done outside the territorial jurisdiction of the United States.

enforce the Act and vesting in the courts jurisdiction of such proceedings.

A heavy burden therefore rests upon petitioners in supporting their interpretation of the Webb-Pomerene Act. Not only should there be forthcoming persuasive evidence of intent by Congress to reverse a long-continued legislative policy but petitioners must square their interpretation with the "cardinal principle of construction that repeals by implication are not favored" (*United States v. Borden*, 308 U. S. 188, 198). We submit that neither the provisions of the Webb-Pomerene Act nor its legislative history support petitioners' interpretation and that, if we look to these sources to determine Congressional intent, they both point directly against the construction advocated by petitioners.

B. *The Webb-Pomerene Act Gives to the Commission Investigatory and Advisory Powers Respecting Violations of the Sherman Act by Export Associations, in Supplement of the Remedies Against Such Violations Provided by the Sherman Act*

The Webb-Pomerene Act was passed within four years after adoption of the Federal Trade Commission Act. In determining the nature of the authority given the Commission by Section 5 of the Webb-Pomerene Act, it is significant that the powers conferred upon the Commission under its basic statute show that Congress conceived of

the Commission as being largely, if not primarily, an investigatory and advisory agency, aiding, in this capacity, enforcement of the antitrust laws by the executive branch of the Government and the courts. The relatively minor extent to which these functions of the Commission have actually been utilized should not obscure the view of the Commission's role entertained by Congress in the early stages of the Commission's development.

Section 6 of the Federal Trade Commission Act (15 U. S. C. sec. 46) authorizes the Commission—

(a) To gather information concerning and to investigate the organization, business, practices and management of any corporation[13] engaged in interstate commerce;

(b) To require of such corporations the filing of annual and special reports, and answers to specific questions, furnishing information concerning such matters;

(c) Whenever a final decree has been entered against a corporation in an equity suit brought by the United States under the antitrust laws, to investigate the manner in which the decree has been carried out, either upon its own initiative or upon application by the Attorney General, and to transmit to him its "findings and recommendations";

(d) Upon the direction of the President or either house of Congress to investigate and report

[13] Banks and common carriers subject to the Interstate Commerce Act are excepted.

the facts relating to any "alleged violations of the antitrust Acts" by any corporation;

(h) To investigate trade conditions in and with foreign countries where combinations or practices of manufacturers or traders may affect our foreign trade, and to report to Congress such "recommendations" as it deems advisable.

Subsection (e) of Section 6 is particularly important here because its language is substantially incorporated in the second paragraph of Section 5 of the Webb-Pomerene Act. Subsection (e) reads:

> Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

Section 7 of the Trade Commission Act provides that in any equity suit brought by the United States under the antitrust laws the court may, upon conclusion of the testimony and if it believes that the United States is entitled to relief, refer the suit to the Commission "as a master in chancery" to report an appropriate form of decree, which report, when made, the court may adopt or reject in whole or in part.[14]

---

[14] Sections 8, 9, and 10 of the Act are in aid of the foregoing powers. Section 8 provides for the furnishing of in-

Except for Section 5, which authorizes the Commission to issue orders against unfair methods of competition, all of the powers given to the Commission by the Act are investigatory or advisory in character.[15] In carrying out these functions the Commission is given no power to make any determination binding upon the executive branch of the Government, upon the courts, or upon private parties. Obviously the grant of these powers to the Commission does not curtail the authority given the Attorney General by the Sherman Act to bring proceedings to enforce the Act and does not curtail the jurisdiction of the courts to entertain such proceedings.

We submit that when Section 5 of the Webb-Pomerene Act likewise conferred upon the Commission authority to investigate violation of the Sherman Act by an export association, to make recommendations as to how such an association might readjust its business so as to bring it in conformity with the law, and to report its findings and recommendations to the Attorney General if the association did not comply with these

---

formation to the Commission by other branches of the Government. Section 9 authorizes the Commission to require testimony or the production of evidence. Section 10 penalizes those who wilfully fail to testify or produce evidence and who wilfully make any false statement in any report required by the Act.

[15] Section 11 of the Clayton Act, 15 U. S. C. sec. 21, authorizes the Commission to issue orders against persons who have violated Sections 2, 3, 7, or 8 of the Clayton Act.

recommendations, the functions conferred upon the Commission were also of an advisory nature, designed only to supplement existing sanctions for the enforcement of the Sherman Act and the powers and jurisdiction which that Act vested in the Attorney General and in the courts to institute and to entertain the judicial proceedings authorized therein.

Petitioners contend that if investigation and report by the Federal Trade Commission under Section 5 of the Webb-Pomerene Act is not a substitute for the judicial proceedings authorized by the Sherman Act against those who violate its provisions, there would result an unlikely grant by Congress of "concurrent" jurisdiction to the Commission and to the courts respecting violations of the Act by export associations. But the policy considerations against a grant of concurrent jurisdiction suggested by petitioners (Br. 41–42) appear insubstantial in view of the express grant by Congress, four years earlier, of true concurrent jurisdiction to enforce certain provisions of the Clayton Act.[16] This grant of concurrent jurisdiction has stood unchanged for 30 years.

In addition, since the Commission is merely authorized to make "recommendations" and no

[16] Section 11 of the Act authorizes the Federal Trade Commission to enforce certain sections of the Act by means of administrative proceedings and Section 15 vests in the federal district courts jurisdiction of suits, brought by the Attorney General, to prevent and restrain any violation of the Act.

penalty is provided for non-compliance, the so-called jurisdiction of the Commission and the jurisdiction which the courts exercise over suits to enforce the Sherman Act operate in different planes; in no real sense is there concurrent jurisdiction. In any event, duplication of effort by two branches of the Government or a "race of diligence" would rarely, if ever, occur.[17] It is perhaps pertinent that the facts which led to the present suit were developed by investigations made by the Department of Justice and did not, directly or indirectly, grow out of any prior investigation by the Commission.

C. *The Provisions for Enforcement of the Sherman Act are not Repealed, as to Export Associations, by the Webb-Pomerene Act, nor does that Act make Application of these Provisions to such an Association Conditional upon the Happening of the Various Contingencies under which the Commission may refer to the Attorney General its "Recommendations" Concerning the Business of the Association*

Petitioners construe the statute (Br. 36–37) as meaning that, as to export associations, there

[17] Where the Commission had begun an investigation the Attorney General would not ordinarily commence judicial proceedings until the Commission's investigation and report had been completed and we assume that the Commission would not first start an investigation after the Attorney General had brought suit under the Sherman Act against an export association.

can be no civil or criminal proceeding by the Attorney General and no triple-damage suit or suit for injunctive relief by any other injured person, all as authorized by the Sherman Act or the Clayton Act, unless and until the following have occurred—

(1) The Commission has made an investigation;

(2) It has concluded that "the law" has been violated;

(3) It has made "recommendations" for bringing the association's business into conformity with law;

(4) The Association has not complied with these recommendations; and

(5) The Commission has referred its recommendations to the Attorney General.

Congress has provided four remedies for enforcement of the Sherman Act. Petitioners concede that if their construction of the Webb-Pomerene Act is adopted, the application of all of these remedies to export associations is suspended and rendered conditional. The present case involves the asserted bar interposed by the Webb-Pomerene Act against an equity proceeding by the United States under Section 4 of the Sherman Act.[18] Petitioners recognize (Br. 54) that whatever barrier the Webb-Pomerene Act im-

[18] Petitioners can find nothing in the Webb-Pomerene Act indicating that it bars civil or criminal proceedings for violation of Section 2 of the Sherman Act. Petitioners are there-

poses, with respect to export associations, against equity proceedings by the United States applies equally to criminal proceedings.[19] And although no language of the Webb-Pomerene Act points even remotely to the barring of suits by injured private persons, petitioners, apparently recognizing the inconsistency in result if proceedings by the United States alone were barred, construe the bar as also extending to suits by private persons (Br. 45–46).

Section 1 of the Sherman Act declares that any person who engages in a combination in restraint of interstate or foreign commerce is guilty of a misdemeanor. An export association which, by acts not given exemption by Section 2 of the Webb-Pomerene Act, engages in such conspiracy commits a misdemeanor unless Section 1 has been repealed as to such association. The Webb-Pomerene Act does not expressly so provide; and if there is a repeal, it must be by implication.

Civil proceedings for enforcement of the Sherman Act would also be repealed, at least *pro tanto*, under petitioners' construction. Section 4 of the

---

fore at somewhat of a loss to explain why the alleged barrier to proceedings should operate against those for violation of Section 1 of the Act but not against those for violation of Section 2 (Pet. Br. 56–57).

[19] This Court, in discussing a like situation under another statute, said that it would be "strange indeed" if Congress, while prohibiting injunctive relief against certain conduct, had permitted it to be the basis for criminal liability. *United States* v. *Hutcheson*, 312 U. S. 219, 235.

Act confers upon federal district attorneys the unqualified power and duty, under the direction of the Attorney General, to bring proceedings to prevent violations of the Sherman Act, and it confers upon federal district courts unqualified jurisdiction of such proceedings. If the Webb-Pomerene Act renders this jurisdiction contingent, Section 4 has, in substantial measure, been repealed. The same would be true of the suits by persons other than the United States, authorized by Section 7 of the Sherman Act and Section 16 of the Clayton Act.

Petitioners describe the jurisdiction which the courts may exercise under their construction of the Webb-Pomerene Act as "consecutive" to the so-called jurisdiction of the Commission (Br. 41). But under petitioners' construction the court's jurisdiction is not merely "consecutive", i. e., conditional; it is, in addition, restricted to passing upon violations of the Sherman Act previously found by the Commission. If Congress intended to make the Commission the final arbiter of violations of the Sherman Act when reference of the Commission's recommendations to the Attorney General does not eventuate, Congress certainly did not intend to make the Commission's determination a nullity when court proceedings do result from such reference. Only if this is true would the supposed requirement of prior administrative determination have any meaning. Accordingly,

acceptance of petitioners' construction leads to the conclusion that, while the Attorney General may prosecute or not and the courts may enjoin or not acts which the Commission has found to be in violation of law, the Attorney General may not seek, and the courts may not grant, relief against acts not found by the Commission to be illegal. The Attorney General and the courts would operate, in other words, as mere agencies for enforcing the Commission's determinations; and the long-continued policy of leaving violations of the Sherman Act to judicial determination would, as to violations of the Act by export associations and their members, be reversed.

Since petitioners' interpretation would mean that the Webb-Pomerene Act has substantially abrogated the sanctions and remedies of the Sherman Act, petitioners may appropriately be called upon to show, as some evidence that Congress so intended, that the Webb-Pomerene Act provides an adequate substitute for the remedies which it nullifies. Examination of the statute discloses, however, that the alleged substitute provided therein is wholly inadequate. Under it, no criminal penalty for violation of the Sherman Act, no matter how flagrant the violation, may be imposed upon an export association. If the Commission determines, upon adequate or inadequate investigation of the facts or upon a correct or incorrect interpretation of the law, that an association has

not violated the Sherman Act, its operations remain immune. Even in the one circumstance in which judicial proceedings may be brought, non-compliance with recommendations made by the Commission, the association is not bound by the Commission's findings of fact made on the basis of supporting evidence.[20] Moreover, the Commission's investigation under the Webb-Pomerene Act may be and appears intended to be, *ex parte*. Conclusions arrived at in such an *ex parte* investigation might not even be admissible in evidence. Cf. *United States* v. *International Harvester Co.*, 274 U. S. 693, 703–704.

Prior to the Webb-Pomerene Act, Congress had, as to certain matters, authorized the Federal Trade Commission to make administrative determinations which should be binding upon the courts if not erroneous in point of law. When it did so, Congress provided in detail for the filing by the Commission of a written complaint, answer by the person against whom the complaint issued, hearings for the taking of evidence offered by both

---

[20] Cf. Section 5 of the Federal Trade Commission Act, 15 U. S. C. sec. 45, and Section 11 of the Clayton Act, 15 U. S. C. sec. 21.

When Section 5 of the Webb-Pomerene Act provides that if an association fails to comply with the Commission's recommendations, the Commission shall refer its "findings" and recommendations to the Attorney General, the word "findings", not previously used in Section 5, apparently means findings of non-compliance with the recommendations, not findings of the association's price practices.

parties, designation of the courts authorized to review the Commission's determination, and the scope of judicial review permitted. See Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act.

A fair test of petitioners' construction of Section 5 of the Webb-Pomerene Act is to compare its provisions, on the one hand, with the foregoing procedure established by Congress when it did intend to confer upon the Federal Trade Commission the power of administrative determination and to compare its provisions, on the other hand, with those of Section 6 (e) of the Federal Trade Commission Act (*supra*, p. 30) when Congress was conferring upon the Commission solely investigatory and advisory powers. Section 5 is totally alien, in structure and content, to the former statutory provisions; it fits the latter like a glove.

D. *The Legislative History of the Webb-Pomerene Act Strongly Tends to Refute Petitioner's Construction of the Statute*

Two conclusions to be drawn from the legislative history of the Webb-Pomerene Act are of great significance. One is that Congress was as much concerned to safeguard domestic trade against restraint by combinations formed to promote export trade as it was to legalize the marketing of American goods in foreign countries through common sales agents. The other is that although Congress extensively debated and sev-

eral times amended the provisos limiting the declared exemption from the Sherman Act, the provisions of Section 5 upon which petitioners rely received almost no notice and were not changed after they had once been included in the bill. The theory that Section 5 drastically limits enforcement of the Sherman Act against export associations which engage in activities not immunized by the Webb-Pomerene Act, is difficult to reconcile with these facts.

The Webb-Pomerene Act had its genesis in a two-volume report entitled "*Cooperation in American Export Trade*" submitted to Congress by the Federal Trade Commission on June 30, 1916.[21] A bill to carry out the Commission's proposals was favorably reported by the House Judiciary Committee in August, 1916.[22] The structure and general provisions of this bill are the same as that finally adopted, except (1) the exemption from the Sherman Act given by Section 2 was limited by only one short proviso and (2) the bill did not include the last two paragraphs of Section 5 or any equivalent thereof.[23] After the bill had passed the House with minor amendments the Senate Committee on Interstate Commerce favorably reported it, with amendments (1) expanding the proviso in Section 2 into two

[21] The Commission made this report pursuant to Section 6 (h) of the Federal Trade Commission Act.

[22] H. Rep. No. 1118, 64th Cong., 1st sess.

[23] Serial 48, 64th Cong., 1st sess., pp. 82–83.

provisos and (2) adding the last two paragraphs of Section 5.[24]

The Senate failed to act on the bill in the 64th Congress but in the next Congress a bill incorporating the changes made by the Senate Commerce Committee was favorably reported by both the House Judiciary Committee and the Senate Commerce Committee[25] and was adopted, after minor amendments, by both branches of Congress.

The two-volume report of the Federal Trade Commission from which sprang the bill recommended legalizing cooperative action by American manufacturers and producers with respect solely to export trade, upon the grounds that such cooperation was prevented by the prevailing doubts as to its legality and that American producers and manufacturers were at a disadvantage in competing, individually, in foreign markets with large combinations of foreign producers and in bargaining with large combinations of foreign buyers.[26] The report at the same time stressed that there was serious danger that combinations to promote export trade "will exploit consumers in the home market and oppress their American competitors in the export trade" (*Id.*, p. 376). The report stated:

[24] S. Rep. No. 1056, 64th Cong., 2d sess., pp. 2, 3–4.

[25] H. Rep. No. 50, 65th Cong., 1st sess., pp. 1, 3–4; S. Rep. No. 109, 65th Cong., 1st sess.

[26] *Cooperation in American Export Trade*, vol. 1, pp. 370–375.

> The safeguard to the interests of the domestic consumer against any artificial stifling of domestic competition through combinations or unfair practices lies in the enforcement of the present antitrust laws, such as the Sherman Act and the Clayton Act, and of the Federal Trade Commission act. * * * In other words, it is no part of the proposal of the Commission to suffer export combinations to be used as a blind to cover attempts to restrain trade at home. The legislation must be framed so that any such attempt shall remain subject to the full rigors of the antitrust laws.

The report of the House Judiciary Committee on the bill introduced to carry out the Commission's proposal expressed the same purpose to assure full application of the antitrust laws to restraints of domestic trade by export associations and their members. The report said:[27]

> The bill is drawn so as to leave in full force our antitrust laws as applied to our own markets and as affecting different American exporters in their dealings with each other. * * *
>
> * * * * * *
>
> The bill does not authorize any violation of the present antitrust laws. * * *

The same committee, when it reported in the next Congress a bill containing the provisions of

[27] H. Rep. No. 1118, 64th Cong., 1st sess., p. 3.

Section 5 on which petitioners rely, repeated the above declarations, quoting in full its earlier report.[28]

The sponsors of the bill in the two Houses, Representative Webb and Senator Pomerene, emphasized the same thought.

Senator Pomerene said:[29]

> It [the bill] does not repeal, it does not affect the Sherman law so far as it applies to domestic commerce. It strengthens the Sherman law and the Federal Trade Commission law, in so far as unfair practices are concerned beyond territorial lines.

At another point the Senator said that "this bill does not repeal the Sherman law" and that associations not staying within the immunity given by Section 2 "violate the law of the land" (*idem.*, p. 172), and that such an association "would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice" (*idem.*, p. 170).

Like views were expressed by Congressman Webb at a time when the last two paragraphs of Section 5 were included in the bill. He said that the language of the provisos of Section 2 "is a perfect preservation of the Sherman law in all of its virility within the confines of this country",[30] and that associations straying beyond the con-

[28] H. Rep. No. 50, 65th Cong., 1st sess., pp. 2–3.

[29] 56 Cong. Rec., pt. 1, p. 173.

[30] 56 Cong. Rec., pt. 5, p. 4724.

fines of their immunity "are liable both under the Federal Trade Commission law and the Sherman antitrust law".[31]

If Congress had intended that Section 5 should effect a major inroad on application of the Sherman Act to restraints of trade by export associations not within the immunity given by the Webb-Pomerene Act, some consideration or notice of this would be found in the Committee reports and Congressional debates. That Congress did not so intend is attested by the absence (except for the Senate colloquy quoted *infra*, pp. 46–47) of such consideration or notice.

The explanation given by the Senate Committee on Interstate Commerce as to its reasons for adding the last two paragraphs of Section 5 is revealing. The committee reported:[32]

> Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, so that they may determine whether and to what extent the laws have been violated.

[31] 55 Cong. Rec., pt. 4, p. 3579.

[32] S. Rep. No. 1056, 64th Cong., 2d sess., pp. 3–4.

> For this reason the committee suggests the amendment at the close of section 5, which reads as follows:[33]

It thus appears that the primary purpose of these provisions was to clothe the Commission with power to investigate the acts and agreements of export associations "beyond the territorial limits of the United States" which might injuriously affect our commerce by means other than "unfair methods of competition". In this connection it was natural to utilize the broad powers of obtaining information which the Federal Trade Commission Act gave to the Commission, powers which Section 5 of the Webb-Pomerene Act made applicable to the Commission's investigations of export associations.[34] Particularly as to acts beyond the territorial limits of the United States might the broad investigatory powers of the Commission be of assistance in unearthing illegal conduct.

The objective of any such investigation by the Commission would be to determine "whether and to what extent the laws have been violated". Formulation of the Commission's conclusions and submission to the association concerned as a basis

[33] Following the committee's quotation of the new paragraphs it briefly summarized their provisions.

[34] Congress had given the Attorney General no power to subpoena witnesses or documents although it is true that grand juries investigating violations of the Sherman Act have such power.

for corrective action by it, as provided by Section 5, were likewise appropriate. But such authority and procedure do not make action under Section 5 a condition precedent to exercise by the Attorney General of his duty, under the Sherman Act, to enforce its provisions or a condition precedent to exercise by the courts of their statutory jurisdiction to entertain proceedings to enforce that Act.

Senator Pomerene directly expressed the opinion that action by the Commission under the Act would not be controlling upon the Attorney General, as shown by the following colloquy (55 Cong. Rec., pt. 3, p. 2788):

> Mr. POMERENE. * * * Our thought was that, if we could frame this bill in such a way as to show the real purpose, the general purpose, with respect to foreign trade, the Federal Trade Commission could be trusted to apply it to cases arising in practice.
>
> Mr. WEEKS. Mr. President, assuming that we are willing to do that and that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?
>
> Mr. POMERENE. *It might do that.*
>
> Mr. KELLOGG. Mr. President——
>
> Mr. POMERENE. But, if the Senator from Minnesota will permit me, if it related to the foreign trade—and that is the purpose

> of this bill—I think it is pretty clear, at least it is clear to my own mind, that the criminal penalties under the Sherman anti-trust law would not apply to these foreign contracts or associations.[35] [Italics supplied.]

If, as Senator Pomerene thought, the Attorney General would not be bound by the Commission's affirmative action under the Webb-Pomerene Act, the Commission's mere inaction, as in the present case, would not deprive the Attorney General of his statutory authority and duty to enforce the Sherman Act or deprive the courts of their statutory jurisdiction of suits to enforce that Act.

In the debates on the bill there can be found statements that export associations would be subject to the "supervision", "control", or "jurisdiction" of the Commission. The Act does give the Commission a measure of supervision, control, or jurisdiction over export associations, but the use in debate of such general terms are of little aid in resolving the issue presented in this case, whether the Commission was given a jurisdiction which is exclusive as against that of the Attorney General and the courts.

---

[35] The doubt expressed as to the application of the criminal penalties of the Sherman Act to foreign contracts is to be taken as a doubt concerning the scope of the substantive prohibitions of that Act rather than as an intimation that the Webb-Pomerene Act narrowed the scope of these prohibitions.

E. *In Analogous Situations a Statutory Grant of Administrative Authority Has Been Held Not to Confer Upon the Administrative Agency Primary Jurisdiction of Violations of the Sherman Act*

The question whether Congress has granted to an administrative body primary jurisdiction to determine whether persons who are subject to administrative authority have violated the Sherman Act depends upon the intent of Congress. This question has already been considered from the standpoint of the language and structure of the Webb-Pomerene Act and of its pertinent legislative history. It is also appropriate to consider, as bearing upon the intent of Congress, the evils with which the applicable legislation is concerned and the means adopted by Congress for dealing with them.

The Sherman Act is unique in that it embraces the entire gamut of agreements or combinations "unduly restricting competition or unduly obstructing the due course of trade",[36] interstate or foreign, and of monopolization or attempted monopolization of such commerce. All such restraints and combinations are within the Act's scope but its prohibitions are defined only in general terms. This Courts has said (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489):

---

[36] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 500.

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, * * *.

The Act "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape." *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 360.

The statute is the exact opposite of one prescribing a detailed code of conduct for a particular kind of trade or commerce, administration of which is ordinarily committed to an administrative body, e. g., railroads, shipping, radio communication, stock exchanges and the security business, public stockyards, bituminous coal, etc. The Webb-Pomerene Act, although confined to export trade, deals with this trade only in the negative fashion of giving it a limited exemption from the Sherman Act."[37]

In view of the character of the prohibitions of the Sherman Act and of their enforcement it is not surprising that this Court has declined to construe legislation providing for exercise of ad-

[37] Requirements for filing certain information are not a prescription of conduct in export trade.

ministrative authority as impliedly conferring, as to violations of the Sherman Act, exclusive primary jurisdiction in the administrative body. The case most directly pertinent is *United States* v. *Borden*, 308 U. S. 188.

In that case an indictment under the Sherman Act charged certain distributors of milk, an agricultural cooperative association, and others with conspiring to fix the prices which distributors paid to producers and the prices at which distributors sold, on milk shipped into the Chicago market. The agricultural cooperative claimed exemption from prosecution under Sections 1 and 2 of the Capper-Volstead Act, 7 U. S. C. secs. 291, 292. This Court held (pp. 204–205) that the acts charged in the indictment were beyond the immunity conferred by Section 1 of the Act, which legalized collective marketing by the members of agricultural cooperatives organized as provided in the section. The case, like the present one, therefore involved a statute granting a limited exemption from the Sherman Act and acts in excess of those given exemption.

Section 2 of the Capper-Volstead Act, like Section 5 of the Webb-Pomerene Act, authorized action by an administrative agency directed toward enforcement of the limitations placed by Congress on the statutory exemption. Section 2 provided that if the Secretary of Agriculture has reason to believe that any cooperative association "monopo-

lizes or restrains" interstate trade to such an extent that the price of any agricultural product is thereby "unduly enhanced", he shall serve upon the association a complaint, hold a hearing for the taking of evidence, and, if he finds his charge sustained, issue a cease and desist order which shall recite the facts found by him. Jurisdiction is given to the district courts to enforce such orders.

This Court rejected the conclusion of the district court that the Act gave to the Secretary "exclusive jurisdiction" to determine, "in the first instance", whether a cooperative was illegally monopolizing or restraining trade and that, until the Secretary acts, "the judicial power cannot be invoked." This Court said (p. 206):

> We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And § 2 of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a pro-

> ceeding by the Secretary. We think that the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1, * * *.

The reasons for the Court's conclusion apply here. The Webb-Pomerene Act also "does not cover the entire field of the Sherman Act." It also "provides only for a civil proceeding". As to acts prohibited by Section 2 of the Sherman Act, the lack of coverage by the Webb-Pomerene Act is complete instead of, as under the Capper-Volstead Act, only partial. It likewise, with reference to the authorized administrative action, "contains no provision giving immunity from the Sherman Act in the absence of a proceeding" thereunder.[38]

The provisions of the Capper-Volstead Act for a "complaint", a "hearing", and an "order" enforceable by specified procedure are those appropriate to an administrative determination of a kind sometimes called quasi-judicial. Cf. *Morgan v. United States*, 298 U. S. 468, 304 U. S. 1. Pre-

[38] Congress, when wishing to create exemptions from the Sherman Act, has repeatedly done so by clear and explicit language. Among many illustrations of this, see, in addition to Section 2 of the Webb-Pomerene Act, Interstate Commerce Act, sec. 5 (11), 49 U. S. C. sec. 5 (11); Agricultural Adjustment Act, Sec. 8b, 7 U. S. C. sec. 608b; Bituminous Coal Act of 1937, Sec. 4 (d), 15 U. S. C. sec. 832 (d); Shipping Act, 1916, Sec. 15, 46 U. S. C. sec. 814.

sumably at least, Congress in creating such a determination would intend it to have a wider scope and effect than that to be given to an *ex parte* investigation and determination of the kind authorized by the Webb-Pomerene Act (see *supra*, p. 38). Since the Capper-Volstead Act did not give the Secretary of Agriculture exclusive primary jurisdiction over violation of the Sherman Act by agricultural cooperative associations, it would seem to be an *a fortiori* conclusion that the Webb-Pomerene Act does not give the Federal Trade Commission such jurisdiction as to export associations.

Even where Congress has established as detailed and inclusive administrative regulation as it has for the railroads under the Interstate Commerce Act, they may be proceeded against for violation of the Sherman Act if the Interstate Commerce Commission does not have authority to prohibit the particular conduct alleged to be in violation of the Sherman Act. *Georgia* v. *Pennsylvania Railroad Co.*, decided March 26, 1945; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290. See *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 161–162. Compare *Nat. Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 222–224.

Under the doctrine of *Georgia* v. *Pennsylvania Railroad Co.*, *supra*, and prior cases, that a pro-

ceeding under the Sherman Act involving its application to commerce for which Congress has provided administrative regulation is not barred if the administrative body is not authorized to prohibit the particular conduct complained of, it follows that the provisions of Section 5 of the Webb-Pomerene Act are not a bar to the present proceedings. That Act gives the Federal Trade Commission no power to prohibit violations of the Sherman Act by export associations. All that the Commission is authorized to do is to investigate and recommend. The only effect of its recommendation is (1) possible acquiescence therein by the offending association and (2), if petitioners' view of the statute is accepted, removal of a barrier against bringing a proceeding under the Sherman Act. Even under petitioners' view, therefore, the statute authorizes prohibition, relief, or remedy by administrative action only in the sense that exercise of the granted administrative authority removes a ban on judicial proceedings, which ban the grant of such authority has itself created. To term this an administrative remedy involves a curious *non sequitur*. We submit that something more substantial is required in order to establish that "Congress intended to create 'so great a breach in historic remedies and sanctions' "! (*United States* v. *Borden*, 308 U. S. 188, 198).

CONCLUSION

For the reasons stated, the writs of certiorari should be dismissed. If, however, the Court should determine otherwise, we submit that the order under review should be affirmed.

HUGH COX,
Acting Solicitor General,
WENDELL BERGE,
Assistant Attorney General;
CHARLES H. WESTON,
HERBERT A. BERMAN,
HERBERT BORKLAND,
Special Assistants to the Attorney General.

APRIL 1945.

APPENDIX

The Webb-Pomerene Act of April 10, 1918

SEC. 1. The words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

* * * * * * *

The word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

SEC. 2. Nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the

United Stafes, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further,* That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

* * * * *

SEC. 5. Every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require

as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon

such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

Nos. 1016, 1017.—October Term, 1944.

United States Alkali Export Association, Inc., Pittsburgh Plate Glass Company (Inc.), Church & Dwight Co., Inc., et al., Petitioners,
1016 *vs.*
The United States of America.

California Alkali Export Association, West End Chemical Co. (Inc.), Pacific Alkali Co., (Ltd.), Petitioners,
1017 *vs.*
The United States of America.

On Writs of Certiorari to the District Court of the United States for the Southern District of New York.

[May 21, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a suit in the District Court for Southern New York, brought by the United States under § 4 of the Sherman Anti-trust Act, 15 U. S. C. § 4, to restrain violations of the Act. The defendants, who are petitioners here, are two incorporated export associations, thirteen domestic members of one or the other, and a British corporation and its American subsidiary, all of which are producers of alkalies. The bill of complaint alleges that petitioners are engaged in a conspiracy to eliminate exports of alkalies to the United States by the foreign members of the conspiracy; to restrict or eliminate exports of alkalies by domestic producers from the United States to many world markets; to prevent independent domestic producers from competing with petitioners in the export of alkalies; to restrict their production of alkalies in the United States; and to fix prices of caustic soda in the United States, all in violation of §1 of the Sherman Act, 15 U. S. C. §1.

The district court denied, 58 F. Supp. 785, petitioners' motion to dismiss the complaint, made on the ground that exclusive jurisdiction of the matters charged in the complaint is vested in the first instance in the Federal Trade Commission, under §§ 1, 2, and 5 of the Webb-Pomerene Act of April 10, 1918, c. 50, 40 Stat. 516, 15

U. S. C. §§ 61, 62, 65. Petitioners then filed here petitions for certiorari under § 262 of the Judicial Code, 28 U. S. C. § 377, seeking review of the order of the district court denying the motion to dismiss.

The questions for decision are (1) whether the order of the district court, denying petitioners' motion to dismiss the complaint, may appropriately be reviewed here by writ of certiorari issued under § 262 of the Judicial Code and, if so, (2) whether §§ 1, 2 and 5 of the Webb-Pomerene Act confer primary jurisdiction on the Federal Trade Commission, exclusive of that of the District Court, to pass upon alleged violations of the Sherman Act by export associations.

Section 4 of the Sherman Act invests the several district courts with jurisdiction to restrain violations of the Act; and it imposes on district attorneys of the United States, under the direction of the Attorney General, the duty to institute suits in equity in their respective districts, to restrain such violations. But § 2 of the Webb-Pomerene Act exempts from the prohibitions of the Sherman Act, associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" and also any "agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association." To this is added a second proviso "that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

The first paragraph of § 5 of the Webb-Pomerene Act requires each association engaged solely in export trade to file with the Federal Trade Commission a statement giving information concerning its officers and stockholders or members, and its place of business, and a copy of its articles of incorporation or its contract of association; the association is required to refile annually such statements with suitable corrections, and to furnish such further specified information as the Commission may from time to time request. Section 5 further provides in its second para-

graph that whenever the Commission shall have reason to believe that an export association is violating the Sherman Act in the ways excepted by the provisos of § 2 from its exemptions, the Commission shall conduct an investigation into the alleged violations. If "it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law." If the association fails to comply with the recommendations of the Commission, it "shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."[1]

Petitioners do not question the district court's rulings, in denying their motion, that the complaint alleges violations of the Sherman Act, and that under its allegations petitioners are not within any immunity from the Sherman Act secured by § 2 of the Webb-Pomerene Act. Their sole contention on the merits is that § 5 of the latter Act, by authorizing the proceedings before the Federal Trade Commission, deprives the district courts of jurisdiction in Sherman Act cases until the Commission has made its investigation and recommendations, the associations have failed to comply with them, and the Commission has referred its findings and recommendations to the Attorney General.

I.

Petitioners argue that this Court may appropriately review the order of the district court by writ of certiorari, issued under

[1] The second paragraph of § 5 of the Webb-Pomerene Act, with which we are especially concerned, reads as follows:

"Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

§ 262 of the Judicial Code. They point out that § 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. § 29, governing appeals in Sherman Act cases, makes no provision for appeals from interlocutory orders or judgments, and provides that "an appeal from the final decree of the district court will lie only to the Supreme Court." See *United States* v. *California Canneries*, 279 U. S. 553. But it is urged that the district court is deprived of its jurisdiction by § 5 of the Webb-Pomerene Act, until the Trade Commission has made the investigation and followed the further procedure outlined by § 5; that the assertion by the district court of its jurisdiction, without awaiting an investigation by the Commission, will entail protracted litigation and impose on the parties great expense before the error can be corrected on appeal from the final judgment to this Court. All this will be avoided, it is said, by awaiting action by the Commission. Hence petitioners insist that the case is appropriate for the exercise by this Court of its extraordinary power to review the order of the district court by writ of certiorari.

Section 262 of the Judicial Code provides that the Supreme Court, circuit courts of appeals and the district courts, "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Under § 262, this Court has power, in aid of its appellate jurisdiction, to review judgments and orders of the district courts by resort to the common law writs of certiorari, mandamus and prohibition. *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268, and cases cited; *In re 620 Church Street Corp.*, 299 U. S. 24, 26, and cases cited; *Ex parte Peru*, 318 U. S. 578, and cases cited; *House* v. *Mayo*, No. 921, decided February 5, 1945, and cases cited; compare *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21. These writs are granted or withheld in the sound discretion of the Court. See *Roche* v. *Evaporated Milk Assn.*, *supra*, 25, and cases cited. In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal, *In re Tampa Suburban R. R. Co.*, 168 U. S. 583, 588, or by an extraordinary remedy, see *Ex parte Peru*, *supra*, 584. But where, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court.

The traditional use of such writs, both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. *In re Chetwood*, 165 U. S. 443, 462 (citing Tidd's Prac. *398, and Bac. Ab., Certiorari); *Whitney* v. *Dick*, *supra*, 139-140; *Ex parte Peru*, *supra*, 583, and cases cited.[2] It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such cases appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal. *In re Tampa Suburban R. R. Co.*, *supra*; *Ex parte Harding*, 219 U. S. 363, 369; *Roche* v. *Evaporated Milk Assn.*, *supra*, 30-31, and cases cited; cf. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66. The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews. *Roche* v. *Evaporated Milk Assn.*, *supra*, 30, and cases cited; and see *Cobbledick* v. *United States*, 309 U. S. 323.

But the present case is not the ordinary one of hardship resulting from overruling a plea in bar or denying a preliminary motion which, if well founded, would end the litigation on the merits—decisions which Congress, in the absence of other provisions for appeal, must have contemplated would, in the ordinary course, be reviewed on appeal from the final judgment. The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress said

[2] See also Regina v. Yarrington, 1 Salk. 406, 91 Eng. Rep. 353 (Q. B. 1710); The King v. The Justices of the West Riding of Yorkshire, 5 T. R. 629, 101 Eng. Rep. 352 (K. B. 1794); The King v. The Justices of Somersetshire, 5 Barn. & Cress. 816, 108 Eng. Rep. 303 (K. B. 1826); The King v. Judge Clements [1932] 2 K. B. 535; The King v. Middlesex Justices [1933] 1 K. B. 72.

to be charged with the duty of enforcing the antitrust laws in the circumstances of the present case. If petitioners' motion was well founded, its denial operated to thwart the asserted purpose of Congress to afford to export associations, which overstep the bounds of the granted immunity, opportunity, with the expert aid of the Trade Commission, to retrace their steps, without being subjected to the penalties of the law. Exercise of its jurisdiction by the district court would preclude the Commission from carrying out its asserted functions of investigation, recommendation and report before any suit by the United States. This would be more than the mere denial of the right of a suitor such as Congress must have contemplated would be corrected by recourse to the prescribed appeal procedure. It would be a frustration of the functions which Congress has directed the Commission to perform and of the policy which Congress presumably sought to effectuate by their performance.

The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment. The case is analogous to those in which this Court has, by writs issued under § 262, reviewed the action of district courts, alleged to be in excess of their authority, by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal, see *In re Chetwood, supra; McClellan* v. *Carland, supra; Ex parte Metropolitan Water Co.*, 220 U. S. 539; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Maryland* v. *Soper (No. 1)*, 270 U. S. 9; *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142; *Colorado* v. *Symes*, 286 U. S. 510; or by which they have deprived a party of a trial by jury. *Ex parte Simons*, 247 U. S. 231; *Ex parte Peterson*, 253 U. S. 300, 305.

For these reasons we think the case is an appropriate one for review of the district court's order by certiorari, and we pass to the consideration of the merits.

II.

Petitioners do not deny that the allegations of the complaint are sufficient to charge violations of the Sherman Act not within the exemptions created by § 2 of the Webb-Pomerene Act. The contention is that since the alleged violations are being committed by and on behalf of export associations which have conformed to § 5 of the latter Act, the authority of the United States to maintain the suit is suspended until the Federal Trade Commission has proceeded against the associations by way of investigation and, if found appropriate, by way of recommendations to them and reference of its findings to the Attorney General, as specified in § 5.

It is conceded that § 5 contains no explicit restriction on the authority of the United States to institute antitrust suits in the normal way, nor any explicit requirement that resort be had to the Commission prior to the institution of such an antitrust suit. Petitioners argue that this is to be implied from the structure of the Act, which first, by § 2, exempts from the Sherman Act certain activities of export associations, with specified exceptions; and then by the second paragraph of § 5, gives the Commission authority, in language substantially identical with that of the exceptions in § 2, to investigate such activities as continue to be violations of the Sherman Act. It is argued that Congress, by authorizing the Commission to investigate violations and in appropriate cases to report to the Attorney General any violations found, has expressed the purpose that the action by the Commission and the Attorney General should be consecutive and not concurrent.

It would follow that however strong the evidence, and however clear the violation of the Sherman Act, the Attorney General must await the action of the Commission, which may or may not undertake to proceed with the case, and that in any event the Attorney General and the courts must abide by the Commission's determination that there are no violations to report. During the twenty-eight years between the enactment of the Sherman Act and the passage of the Webb-Pomerene Act, the plenary authority and settled practice of the Department of Justice to institute antitrust suits, without prior proceedings by other agencies, became firmly established. A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may appropriately be brought,

would require a clear expression of that purpose by Congress. *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, 203-206; see also *Georgia* v. *Pennsylvania R. R. Co.*, No. 11, Original, decided March 26, 1945, p. 12 of slip opinion. The Webb-Pomerene Act, as we have said, contains no explicit indication to that end. Nor may such an implication be readily drawn from the language of the statutes, or their legislative history.

In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations.

This is in marked contrast to the Commission's power to issue cease and desist orders with respect to violations of § 5 of the Federal Trade Commission Act, as amended, 15 U. S. C. § 45,[3] and with respect to violations of the Clayton Act, §§ 1, 3, 7, 8, 11, as amended, 15 U. S. C. §§ 13, 14, 18, 19, 21.[4] On the other hand, it is consonant with and closely related to another important function of the Commission, which from the beginning has had extensive powers to investigate and report on practices which concern or affect the enforcement of laws relating to trade and commerce, including the antitrust laws.[5] Such investigations by

[3] Section 5 of the Federal Trade Commission Act, as amended, 15 U. S. C. § 45, declares that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce," are unlawful.

[4] Section 1 of the Clayton Act, 15 U. S. C. § 13, prohibits certain discriminations in price and services; section 3, 15 U. S. C. § 14, certain sales or leases where the purchaser is required to refrain from dealing with competitors of the seller; section 7, 15 U. S. C. § 18, certain acquisitions by corporations of stocks in other corporations; and § 8, 15 U. S. C. § 19, certain interlocking directorates. Section 11, 15 U. S. C. § 21, confers on the Commission power to issue cease and desist orders with respect to violations of §§ 1, 3, 7 and 8.

[5] Section 6(e) of the Federal Trade Commission Act, 15 U. S. C. § 46(e), authorizes the Commission, in language comparable to that of § 5 of the Webb-Pomerene Act, "upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law." Section 6 further authorizes

the Commission have never been deemed prerequisite to antitrust suits by the United States; and there is nothing to suggest that Congress, in authorizing the Commission to investigate export associations, intended to place such investigations on any different footing than others, which the Commission had already been authorized to conduct.

It is suggested that Congress could not have contemplated "concurrent jurisdiction" of the Commission and the courts, because of the inconvenience to suitors in not being afforded an opportunity to mend their ways by following the Commission's recommendations. And petitioners urge that Congress could not have intended concurrent jurisdiction, since it explicitly provided for it when it so desired. Thus §§ 1, 3, 7, and 8 of the Clayton Act, as amended, 15 U. S. C. §§ 13, 14, 18, 19, may be enforced either by cease and desist orders of the Commission, § 11, 15 U. S. C. § 21, or by suits in equity instituted by the several district attorneys in their respective districts, under the direction of the Attorney General, § 15, 15 U. S. C. § 25.

This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes which the Commission may enforce). The Commission, by its investigations and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation, or because the associations have satisfactorily corrected their trade practices. But the Commission does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General. Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only

the Commission to investigate the organization, business, practices and management of any corporation engaged in interstate commerce; to require such corporations to file annual and special reports and answers to questions concerning such matters; to investigate the manner in which corporations, defendants in Sherman Act suits brought by the Government, have complied with the decrees, and to transmit to the Attorney General its "findings and recommendations"; to investigate and report, upon the direction of the President or Congress, the facts relating to any "violations of the antitrust Acts by any corporation"; to investigate trade conditions in foreign countries where trade practices may affect our foreign trade, and to report to Congress its recommendations.

because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; the violations here alleged are not violations of the Webb-Pomerene Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States.

But even if the case were one of concurrent jurisdiction, we cannot assume that there would be any unseemly conflict between the Commission and the Department of Justice. Congress has found no such objection to the concurrent jurisdiction to enforce the provisions of the Clayton Act to which we have referred. The two agencies will seldom act simultaneously. There would be no occasion for an investigation by the Commission if the Attorney-General had already procured the requisite evidence of violations and was ready to proceed with his suit, as is said to be the case here. And there is no basis for interpreting the statute as though it had been contrived to prevent hostile action rather than to encourage efficient cooperation between the Commission and the Department of Justice.

As we have said, the Webb-Pomerene Act's grant of power to the Commission would curtail the authority of the United States to conduct antitrust suits only if it were deemed to be an implied repeal *pro tanto* of § 4 of the Sherman Act. As we pointed out in *United States* v. *Borden Co.*, *supra*, 198-199, 203-206, such repeals by implication are not favored. There we held that provisions of the Capper-Volstead Act, 7 U. S. C. §§ 291, 292, comparable to those of §§ 2 and 5 of the Webb-Pomerene Act, did not operate to restrict the authority of the United States to maintain suits for violation of the antitrust laws.

Sections 1 and 2 of the Capper-Volstead Act, c. 57, 42 Stat. 388, 7 U. S. C. §§ 291, 292, authorized collective marketing by members of agricultural cooperatives but empowered the Secretary of Agriculture to issue cease and desist orders, upon investigation and findings that any such cooperative associations monopolized or restrained interstate trade and commerce to such an extent that the prices of any agricultural products were thereby unduly enhanced. And the Act gave jurisdiction to the district courts to enforce the Secretary's orders.

This Court rejected the contention that the Capper-Volstead Act gave to the Secretary "exclusive jurisdiction" to determine in the

first instance whether the acts of the cooperatives were violations of the Sherman Act because they went beyond the immunity granted by the Capper-Volstead Act. And we held for the same reasons, which are controlling here, that neither the language nor the structure of the Capper-Volstead Act indicated a Congressional purpose to make the procedure by the Secretary, which it established, either a substitute for or a prerequisite to a suit by the United States under the Sherman Act. *A fortiori* no such purpose is to be inferred from the Webb-Pomerene Act, which has withheld from the Commission any authority to enforce the Sherman Act.

Petitioners appeal to the familiar principle that equity will not lend its aid to a plaintiff who has not first exhausted his administrative remedies. *Natural Gas Co. v. Slattery*, 302 U. S. 300, 310-311; *Myers v. Bethlehem Corp.*, 303 U. S. 41, 51, and n. 9, and cases cited. And especially they urge that the Government may not proceed with the prosecution of a Sherman Act case until the relevant issues have been submitted to and passed upon by an administrative tribunal established by the Government to determine those issues. *See United States v. Pacific & Arctic Co.*, 228 U. S. 87, 106-108. To this the answer is, as already indicated, that the only function of the Federal Trade Commission under § 5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer.

Thus the words of the Webb-Pomerene Act and its setting lend no support to petitioners' contention. And there is nothing in its legislative history to show a Congressional purpose to restrict the authority of the United States to maintain suits for every kind of violation of the antitrust laws. The precise problem presented by the present case was not referred to in the committee reports or the debates, except in a remark by Senator Pomerene, indicating that the Act does not preclude suits by the United States before the Commission has made its investigation.[6] But the absence of

[6] In response to a question by Senator Weeks, that "assuming . . . that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?", Senator Pomerene answered: "It might do that." 55 Cong. Rec. 2788.

more extended discussion of the matter is in itself persuasive evidence that there was no purpose to repeal any portion of § 4 of the Sherman Act. And Congress's clear purpose to insure continued and vigorous application of the antitrust laws to domestic restraints of trade, notwithstanding the Webb-Pomerene Act, is shown by the Committee Reports[7] as well as by statements of the sponsors of the legislation on the floors of Congress,[8] and is a strong indication that there was no thought of depriving the Attorney General of any of his powers to prosecute antitrust suits.

We conclude that the United States was authorized to bring this suit, and that the Commission's powers conferred by § 5 of the Webb-Pomerene Act do not preclude the suit before the Commission has acted. The order of the district court is therefore

Affirmed.

Mr. Justice ROBERTS concurs in this opinion in respect of this Court's exercise of jurisdiction under § 262 of the Judicial Code. He dissents from the decision that the District Court had power to hear the cause in the absence of an investigation and recommendation by the Federal Trade Commission.

---

[7] H. Rep. No. 1118, 64th Cong., 1st Sess., p. 3; S. Rep. No. 1056, 64th Cong., 2d Sess., pp. 3-4. See also H. Rep. No. 50, 65th Cong., 1st Sess., pp. 1, 3; S. Rep. No. 109, 65th Cong., 1st Sess., pp. 3-4; Federal Trade Commission, Report on Cooperation in American Export Trade, (1916) Vol. 1, p. 376, *et seq.*

[8] Senator Pomerene said, 56 Cong. Rec. 173: "It [the bill] does not repeal, it does not affect the Sherman Law so far as it applies to domestic commerce. It strengthens the Sherman law and the Federal Trade Commission law, in so far as unfair practices are concerned, beyond territorial limits." And he also said: "this bill does not repeal the Sherman law", and that associations not remaining within the immunity granted by § 2 "violate the law of the land." (p. 172.) He said further that such an association "would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice." (p. 170.) Congressman Webb, in discussing the amendment to § 5, said that the language of the provisions of § 2 "is a perfect preservation of the Sherman law in all of its virility within the confines of this country", 56 Cong. Rec. 4724, and that associations straying beyond the confines of their immunity "are liable both under the Federal Trade Commission law and the Sherman antitrust law." 55 Cong. Rec. 3579.